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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~366~~. 93

THE HOT SPRINGS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

FANNIE G. WILLIAMSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED SEPTEMBER 27, 1886.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between Fannie G. Williamson, plaintiff, and The Hot Springs Railroad Company, defendant, wherein was drawn in question the construction of a statute of the United States and the decision was against the right and privilege set up and claimed under said statute, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 22nd day of January, in the year of our Lord one thousand eight hundred and eighty-six.

[The Seal of the Circuit Court, Arkansas District, U. S. A.]

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—
STERLING R. COCKRILL,
Ch. Justice.

2 STATE OF ARKANSAS:

In the Supreme Court.

I, Luke E. Barber, clerk of the supreme court of the State of Arkansas, hereby certify that, in obedience to the mandate of the within writ of error, a duly certified transcript, under the said seal of said court, of the record and proceedings in the cause therein stated, with all things concerning the same, except as in the certificate thereof, is hereto attached.

In testimony whereof I hereto set my hand as clerk of said su-

preme court and affix the seal of said court at my office, in the city of Little Rock, this 20th day of May, A. D. 1886.

[Seal of the Supreme Court of Arkansas.]

L. E. BARBER, *Clerk.*

3 The United States of America to Fannie G. Williamson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Arkansas, wherein The Hot Springs Railroad Company — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. R. Cockrill, chief justice of the supreme court of Arkansas, this 23 day of January, A. D. 1886.

[Seal of the Supreme Court of Arkansas.]

S. R. COCKRILL,
Ch. Justice.

4 STATE OF ARKANSAS, *County of Garland:*

I have, this 25th day of January, A. D. 1886, duly served the within by delivering a true copy of the same to the within-named Fannie G. Williamson.

W. F. HOUSLEY, *Sh'ff,*
By D. F. PARKER, *D. S.*

Fees, service, 85c.

[Endorsed:] Served 25 Jan'y.

5 *Transcript of Record of Circuit Court.*

STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered that at a term of the supreme court of the State of Arkansas begun and held at the court-house, in the city of Little Rock, on the 23d day, being the fourth Monday, in [of] November, eighteen hundred and eighty-five, were the following proceedings on the 2d day of January, A. D. 1886, a day of said term, in the case of—

HOT SPRINGS RAILROAD CO., Appellant,
vs.
FANNIE G. WILLIAMSON, Appellee.

Appeal from Garland circuit court.

Complaint.

In Garland Circuit Court. Feb. Term, 1883.

CURNEL S. WILLIAMSON and FANNIE G. WILLIAMSON, Plaintiffs,

vs.

THE HOT SPRINGS RAILROAD COMPANY, Defendant.

Complaint at law.

The plaintiffs, Curnel S. Williamson and Fannie G. Williamson, state that the plaintiff, Fannie G., whose husband the plaintiff, Curnel S., is, is and at the time of the wrongful conduct & acts of the defendant hereinafter set forth was the owner in fee of the following lands in the city of Hot Springs, Garland county, State of Arkansas, viz: Lots No. one (1) & two (2), in block No. 78, and lot No.
6 (9), in block No. 69, in said city; that said lots No. one (1) & two (2) are separated by Benton street, in said city, a street one hundred and forty feet wide, by the authority of the Government of the United States laid out and dedicated with the other streets of said city to said city, before the acts of defendant hereinafter set forth, as streets & for no other purpose; that said lot No. 9 (9) is bounded on the north by the south line of said street and said lot No. one (1) by the north line thereof, while said lot two is bounded on the south by lot No. one.

That the defendant, a railroad company organized, incorporated, and existing under the laws of the State of Arkansas, in the corporate name of the Hot Springs Railroad Company, with its termini at said city and Malvern, in Hot Springs county, in said State, by and through its agents and employees, on and prior to the 10th day of December, 1881, in said year, constructed, threw up, and completed in and along the center of said street, immediately between said lots No-. one and nine and running the full length thereof, a permanent embankment of earth and stone, of the breadth of fifty feet and of great height, to serve as a road-bed for its railroad track, under a fraudulent and unauthorized contract or arrangement, a copy of which, as Exhibit "A," is annexed to and made part
7 of this complaint, which is for the purpose of defrauding and injuring plaintiffs. It procured, through its agents and officials, the officers of said city to enter into secretly and clandestinely and also constructed at the southeast corner of said embankment and the northeast corner of said lot No. nine (9) a turning table, and immediately thereafter proceeded to lay and fix said railroad track permanently upon said embankment, which thereby became and now is a part of said railroad line and track of defendant, being an extension thereof; that by the said embankment, extension, and turning table plaintiff and others are cut off from and deprived of the use of said street in connection with said lots and their egress and ingress therefrom and thereto impaired and destroyed; that thereby said lots, which, by reason of their lateral frontage upon and

propinquity to said street, were of great value, have been greatly damaged and decreased in value to the extent of five thousand dollars; that since the dedication of said street to said city the defendant has wrongfully appropriated almost the whole of it for its roadbed and other purposes, wantonly injuring plaintiffs and all other owners of land adjoining said street.

Wherefore plaintiffs pray judgment against the defendant
8 and for five thousand dollars and for other relief.

GEO. MURPHY,
Att'y for Pl'ffs.

Curnel S. Williamson, one of the plaintiffs, says he believes the statements of the foregoing complaint are true.

C. S. WILLIAMSON.

Sworn to and subscribed before me this 10th day of Oct., 1882.

J. H. LAW, *Cl'k.*
Z. BELDIN, *D. C.*

Summons.

The State of Arkansas to the sheriff of Garland county:

You are commanded to summon The Hot Springs Railroad Company to answer, on the 1st day of the next February term, 1883, of the Garland — court, a complaint filed against it in said court by C. S. Williamson and Fannie G. Williamson, and warn it that upon its failure to answer the complaint will be taken for confessed; and you will make due return of this summons on the 1st day of the next February term, 1883, of said court.

Witness my hand and the seal of said court, at Hot Springs, this 10th day of October, 1882.

[L. S.] J. H. LAW, *Clerk.*

STATE OF ARKANSAS, *County of Garland:*

I have this 10th day of Oct., A. D. 1882, duly served the within by delivering a copy of the same to the within-named defendant, as herein commanded.

J. N. NICHOLS,
By JOB PRICHARD.

Fees:

Service	50
Mileage	10
Return	25
	85

In the Garland Circuit Court.

G. S. WILLIAMSON and FANNIE G. WILLIAMSON
vs.
HOT SPRINGS RAILROAD COMPANY.

9 *Answer.*

Defendant does not know whether the plaintiff, Fannie G., owns said lots and has no knowledge or information in regard thereto except as the same is derived from the allegations of the complaint. Defendant states that the alleged lots are located in and upon Malvern avenue, one of the original streets of the city of Hot Springs, which was laid off by said city as a street in the year 187– and opened and continuously thereafter used as a street, and said street has never been vacated by said city.

Defendant further says its railroad is constructed in and upon its right of way granted it under an act of Congress entitled "An act in relation to the Hot Springs reservation, in the State of Arkansas," approved the 3d day of March, 1877, and under the alleged ordinance of the city of Hot Springs; and defendant denies that said ordinance was passed clandestinely or through the fraud of the defendant.

Said turn-table is constructed on defendant's right of way, granted it by Congress as aforesaid, and upon lots ten and eleven, in block 99, in said city, which is the property of the defendant.

J. M. MOORE, *Att'y.*

Endorsed: #914. No.—. C. S. Williamson & wife *vs.* Hot Springs R. R. Co. Answer. Filed Feb'y 22, 1883. Z. Belden, clerk.

10 *Further Answer.*

Garland Circuit Court.

C. S. WILLIAMSON & WIFE *vs.* HOT SPRINGS R. R. Co.

Defendant, further answering, says the said C. S. Williamson is improperly joined as a plaintiff in said action.

J. M. MOORE, *Att'y.*

Endorsed: C. S. Williamson *vs.* H. S. R. R. Co. Ad'l ans. Filed Oct. 30, 1883. Z. Bendin, clerk.

In Garland Circuit Court.

C. S. WILLIAMSON and FANNIE G. WILLIAMSON
vs.
HOT SPRINGS RAILROAD COMPANY.

At the trial of said cause the following agreed statement of facts and map were filed:

Agreement of Facts.

Garland Circuit Court.

C. S. WILLIAMSON *vs.* H. S. R. R. Co.

The following facts are agreed on in said cause:

1st. The accompanying map shows the location of Malvern avenue, Benton street, the plaintiff's lots, and of the right of way granted by Congress to the defendant under the act referred to in defendant's answer, and approved by the Hot Springs commission and
11 the Secretary of the Interior.

2d. The extension claimed by the defendant under the ordinance of the city of Hot Springs consists of a strip fifty feet wide, the center thereof on a direct line with the centre of the right of way granted by Congress and extending westward to Malvern avenue, a distance of 130 feet.

3d. The turn-table is fifty feet in diameter; it is located as marked on the map. Lots 10 and 11, in block 69, upon which a part of the turn-table is located, belong to the defendant.

4th. Gaines avenue was located as a street of said city of Hot Springs and opened and accepted by the city in 1876, Oct. or Sep.; it was 80 feet wide and the northern boundary thereof was about coterminous with the northern boundary of defendant's right of way. The right of was is 100 feet wide, subject to explanation.

G. W. MURPHY,
R. G. DAVIES,
Att'ys for Pl'ff.
J. M. MOORE,
For Def't.

Endorsed: G. S. Williamson *vs.* H. S. R. R. Co. Agreed statement of facts. Filed Oct. 30th, 1883. Z. Belden, clerk.

The following patent was introduced; also map of the Hot Springs commission of the condition of the reservation before it was laid off by the Hot Springs commission:

12 *Patent to F. G. Williamson for Land.*

Certificate No. 548.

The United States of America to all to whom these presents shall come, Greeting:

Whereas by virtue of the acts of Congress approved March 3d, 1877, December 16th, 1878, and June 16th, 1880, there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Little Rock, Arkansas, whereby it appears that full payment has been made by Fannie G. Williamson, of Garland county, Arkansas, and her claim thereby

established and duly consummated in conformity to law, for the lots numbered one and two, in block seventy-eight, and the lot numbered nine, in block sixty-nine, of the Hot Springs reservation, in Arkansas, according to the official plat of said reservation returned to the General Land Office by the commissioners appointed under the acts of Congress above referred to: Now know ye that there is therefore granted by the United States unto the said Fannie G. Williamson the lots or tracts of land above described; to have and to hold the said lot or tract of land, with the appurtenances thereof, unto the said Fannie G. Williamson and to her heirs and assigns forever, subject to the proviso found in the act of December 16th, 1878, in the following words, to wit: "Provided, That all titles given or to be given by the United States shall explicitly ex-
13 clude the right to the purchaser of the land, his heirs or assigns, from ever boring thereon for hot water."

In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the tenth day of May, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and sixth.

By the President:

CHESTER A. ARTHUR,
By W. H. COOK, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 2, page 47.

The following ordinances of the city of Hot Springs were introduced, and it was admitted that they were adopted by the city council, namely:

Ordinance as to Right of Way.

An ordinance authorizing the execution of a contract with the Hot Springs Railroad Company in regard to its "right of way."

Whereas the Hot Springs Railroad Company has proposed to the city council to locate its depot for passengers at some point west of Pleasant street, in the city of Hot Springs, and to do other improvements set out in a petition by it to the city council; therefore

Be it ordained by the city council:

14 SEC. I. That that part of Cottage street which is located upon and across the "right of way" granted by Congress to the Hot Springs Railroad Company as such right of way, was [as] located by the Hot Springs commissioners, be, and the same is hereby, closed, and that part of Palm street lying between Gulpha and Benton streets be, and the same is hereby, closed; and that said railroad company is hereby granted license to use and occupy that

portion of said street so closed as aforesaid for erection of depot buildings or shops or other necessary purposes in the operation of its road.

SEC. II. That a "right of way" of fifty feet in width, the center thereof to be in a direct line with the center of the "right of way" set apart to said railroad company by the Hot Springs commissioners, be, and is hereby, granted to the Hot Springs Railway Company from the western terminus of the "right of way" granted to it as aforesaid to Malvern street, the same being a distance of one hundred and thirty feet (130 ft.).

SEC. III. Be it further ordained, That it shall be the duty of the Hot Springs Railway Company to construct and maintain safe and convenient crossings at all points where the "right of way" of said company is intersected by any of the streets of said city, except Cottage and Palm streets aforesaid, and shall build and maintain a culvert upon Benton street between Cottage and Pleasant streets
15 of sufficient dimensions to drain said streets, and to erect and maintain in good repair a safe and substantial bridge at the crossing of Pleasant street, which shall be guarded by strong and substantial hand rails, running north and south, of three feet in height.

SEC. IV. That the mayor of this city is hereby authorized and directed to execute a contract, in writing, with the said Hot Springs Railroad Company granting the said company the right and privileges aforesaid, upon the condition that the said railroad company will obligate itself in said contract to comply with the provisions of section three of this ordinance; and it shall be the duty of the president of said railroad company, if said company shall accept the benefits of this ordinance, to file the written acceptance of said company with the city clerk within ten days from the date of its adoption.

SEC. V. This ordinance shall take effect and be in force from and after its passage.

Approved this 8 day of December, 1880.

T. F. LINDE, *Mayor.*

Attest: H. JAMES,
City Clerk.

An ordinance authorizing the Hot Springs R. R. Co. to erect and maintain depot buildings and enclose "right of way" on Benton street from Pleasant street to Malvern avenue.

16 *Ordinance as to Buildings, &c.*

Be it ordained by the city council of Hot Springs:

SEC. I. That the Hot Springs Railroad Company shall be, and is hereby, authorized and empowered to erect all necessary and suitable depot buildings and other structures incident to the operation of its road within the limits of its "right of way," granted it by Congress, within the Hot Springs reservation, and to maintain and continue the same or any depot buildings or other erections or improvements heretofore constructed or made by it.

SEC. II. That part of Benton street between Pleasant street and Malvern avenue, within the limits of the "right of way" granted by Congress to the Hot Springs Railroad Company within the Hot Springs reservation and the extension thereto, heretofore granted by the city of Hot Springs, except so much thereof as shall be required to leave open the crossing of Cottage street, is hereby vacated and closed, and the extensive use and control thereof is granted to the Hot Springs Railroad Company for railroad and depot purposes.

SEC. III. This ordinance shall take effect and be in force from and after its passage.

Approved Feb'y 26, 1883.

A. R. SMITH, *Mayor.*

Attest: D. H. HARRIS,
City Clerk.

I, D. H. Harris, city clerk of the city of Hot Springs, Ark.,
17 hereby certify that the above and foregoing are true and correct copies of the ordinances adopted by the city council of this city in regard to "right of way" of Hot Springs railroad.

Given under my hand and the seal of this office this 28th day of Feb., A. D. 1883.

D. H. HARRIS,
City Clerk.

Endorsed: Original ordinance vacating Benton street. Ordinance to be copied.

And it was admitted that the defendant filed its written acceptance of the ordinance approved the 8th day of December, 1880, within ten days after its adoption.

The following contract between the city of Hot Springs and the defendant was introduced:

Agreement as to Right of Way.

City of Hot Springs to Hot Springs Railroad.

Right of way.

This agreement, made and entered into this the 2d day of December, 1880, by and between the city of Hot Springs, party of the first part, and the Hot Springs Railroad Company, party of the second part, witnesseth:

That the party of the first part, in pursuance of the provisions of an ordinance of its council adopted the 1st day of December, 1880, does hereby grant to the party of the second part a right of way fifty feet in width, beginning at the western terminus of the right of way granted by Congress to the party of the second part,
18 running thence to Malvern street, a distance of one hundred and thirty feet, the center thereof to be on a direct line with

the center of the right of way granted by Congress to the party of the second part; and the party of the first part hereby authorizes and empowers the party of the second part to use and occupy the portions of Cottage and Palm streets which were closed by an ordinance of its council adopted the 1st day of December, 1880, to wit, the said Cottage street at the point where the same intersects the right of way of the party of the second part, that part of Palm street lying between Gulpha and Benton streets. In consideration whereof the party of the second part hereby agrees and binds itself to permanently locate its passenger depot at some point west of Pleasant street, to build and maintain a culvert upon Benton street between Cottage and Pleasant streets of sufficient dimensions to drain said street, to construct and maintain safe and convenient crossings at all points where its right of way shall intersect any of the streets of the party of the first part, except Cottage and Palm streets aforesaid, and to erect and maintain in good repair a safe and substantial bridge at the intersection of Pleasant street with its right of way.

In testimony whereof the said city of Hot Springs, by its mayor, T. F. Linde, and the said railway company, by its president,
19 Joseph Reynolds, have signed and sealed the foregoing agreement the day and date above written.

THE CITY OF HOT SPRINGS,
By T. F. LINDE,
Mayor City of Hot Springs, Garland Co., Arkansas. [SEAL.]
THE HOT SPRINGS RAILROAD CO.,
By JOSEPH REYNOLDS.

Filed for record Jan'y 28th, 1881, at 3 p. m.
J. W. LAW, *Clerk.*
W. WRIGHT, *D. C.*

STATE OF ARKANSAS, }
County of Garland, } ss:

I, J. H. Law, clerk of the circuit court and *ex officio* recorder of the county aforesaid, hereby certify that the within and foregoing is a true and perfect copy of the right of way of the city of Hot Springs to the Hot Springs R. R. Co. as now appears upon record in my office of Record "F," page 458, of Deeds and Mortgages.

In testimony whereof I hereunto set my hand and affix my official seal on this 9th day of April, 1881.

[L. S.] J. H. LAW, *Clerk.*

Endorsed: No fee due. Contract between city of Hot Springs and the defendant to be copied.

And it was admitted that the defendant complied with the agreements therein.

Testimony of C. S. Williamson.

2. The plaintiffs then introduced C. S. WILLIAMSON, who, being duly sworn, testified as follows:

The railroad company built an embankment in Benton street extending from its right of way granted by Congress to
20 Malvern avenue, a distance of 130 feet. The embankment is walled with stone and is two or three feet above the grade of the street, and six railroad tracks are laid on the embankment. The turn-table is just east of the lot, on the south side of the street. Lot 9, in block 69, is south of the embankment. It (the lot) is 54 feet front on Malvern avenue, and runs back 105 on the south line of Benton street and 90 feet on south side of the lot. There is a space of 25 feet between this lot and the south side of the embankment. Cars stand on the embankment and ring bells. It creates danger from fire. There are no improvements on lot 9. Lots 1 & 2, in block 78, have a blacksmith shop and two cottages on them. They sometimes overflow on the lower side in case of high rise in the creek. Lot 9, in block 69, would be worth $100.00 per foot without the embankment. It is not worth more than ½ to one-third with the embankment there.

Lots 1 & 2, in block 78, would be worth $150 without the embankment, while they would not be worth more than half that amount with the embankment in Benton street. The lots had been laid out when the embankment was built.

Williamson Objected to as a Witness.

The defendant objected to the competency of C. S. Williamson on the ground that the property belonged to the wife and he could not testify in her behalf. The objection was overruled and the defendant excepted.

21 *Gaines' Testimony.*

WILLIAM H. GAINES, being sworn, deposes as follows:

I gave the lots described in the complaint to my daughter, Fannie G. Williamson, in 1876. The claim as put in before the Hot Springs commission was much larger than it is now, and fronted 300 feet on the west side of the old Malvern stage road.

In 1875 I laid out a street called Gaines avenue, 80 feet wide, from the east side of the Malvern stage road, opposite the property. The claim of Fannie G. Williamson to the place where the Hot Springs R. R. depot — was afterwards established. When the r'road established the depot at the east side of said avenue I constructed a street r'way along it. It was used as such until the r'road company extended its track up to its present terminus, between the lots of the plaintiff. This street, Gaines avenue, & Benton street, after it was laid out, was used as a thoroughfare by all persons going to and from Hot Springs.

The present location of old Gaines avenue would be entirely within the right of way as granted to the Hot Springs R. R. Co. by acts of Congress.

The embankment between plaintiff's lots is enclosed by a granite wall, which stands up above the grade of the street.

The lots are damaged by the embankment. If the embank-
22 ment had not been made it would have been very desirable business property. It was on a kinde of square 140 feet one way and longer the other way. There was plenty of room for wagons to congregate and trade, and these lots are corner lots, which made them more valuable than any other property in the neighborhood. Men differ about the value of property here very much. I am familiar with the value of property in that neighborhood. The west side of Benton street is used a great deal, while the south side cannot be used at all, owing to the obstructions placed in it by the r'road company.

Lots 1 & 2 are very valuable on account of their situation. The difference in the value of the three lots, by reason of the embankment being there, is fully five thousand dollars ($5,000.00). The square or large space cannot now be used by wagons for the purpose of congregating there. Benton street was extended through plaintiff's claim by the commissioners, leaving part of it on each side.

A. Gaines' Testimony.

ALBERT GAINES testified as follows:

The embankment was built 130 feet beyond the right of way granted by Congress in Benton street. The embankment obstructs travel. It is 50 feet wide, enclosed by a granite wall, and extends from Malvern avenue east. The street at this point is 140 feet wide.

The turn-table & tracks prevent any travel on the south side
23 of Benton street or egress from lot 9, block 69, in that direction. You would have to go around the embankment to get into Benton street. The embankment is 25 feet from lot 9 and 65 feet from lots 1 & 2, block 78. The only way to get at the damage by the embankment is to guess at it. I would say lot 9 would be worth without the embankment $100 per front foot. The embankment damages it ⅓. Lot- 1 & 2 are worth $150 per front foot on Malvern street. They are damaged ⅓. The whole property is damaged from 4 to $5,000. Lot 9 was worth $40 per front foot just before the construction of the embankment. Property all over the town of Hot Springs increased very rapidly from the time of the settlement of the title. Just before the construction of the embankment the lots 1 & 2 were worth $175 per front foot. They were worth more than these sums just after. The defendant has constructed a depot building, laid 3 tracks, and built a fence in Benton street just east of the embankment and between Malvern avenue & Cottage street. All the property along there has been damaged by the obstructions in Benton street. I am familiar with the value of property in this neighborhood.

Geo. Belding's Testimony.

GEO. BELDING testified as follows:

Lot No. 9 is worth 50% less than it would be if the embankment were not there. It would be worth without the embankment
24 $100 per front foot. Lots 1 & 2 are not so much injured. They still have a front. Lot 9 was worth $30 per front foot just before the improvements were placed in Benton street, except the embankment.

McLaughlin's Testimony.

J. H. MCLAUGHLIN testified as follows: I am familiar with the value of property in that neighborhood. Said lot 9 was damaged one-half. Lots 1 & 2 are not affected so much. Lot 9 is worth 75 to 100 per front foot. It would be worth $200 per front — if the embankment was away. The lot south of lot 9 has been offered very cheap for sale since these improvements were built, but could not be sold. All property has increased in value in that neighborhood, but these corner lots have not increased in proportion to the balance of the property near it.

Hotchkiss' Testimony.

E. B. HOTCHKISS testified he owned land in the same block and lived there. Lot No. 9 is worth ½ (one-half) less by reason of the embankment than it would be if the embankment were away. Lots 1 & 2 are not damaged so much—say ¼ less. I don't know the value of these lots before the building of the embankment. All the property in this block is injured by the obstructions placed in the street by the R. R. company.

Ward's Testimony.

JNO. D. WARD testified that he was familiar with the value of lots in the vicinity; that he had bought and sold property in the
25 neighborhood. Lot 9 is damaged one-third by the embankment. Lots 1 & 2 are damaged 10 per cent. by the embankment.

Hagan's Testimony.

CHRIS. HAGAN testified that he had bought, sold, and owned — in the vicinity; that lot 9 was damaged 50 per cent., lots 1 & 2 10 or 15 per cent., by the embankment. Lot 9 was worth before the embankment $60 per front foot. I cannot estimate the value just after the embankment was built.

Hudgins' Testimony.

H. M. HUDGINS testified as follows: Lot adjoining or below the embankment, being lot No. 9, block 69, is damaged 50 per cent.;

could not place an estimate on the damage to lots 1 & 2; do not think they are damaged as much as lot No. 9; cannot state the value of lots of [on] Malvern street; have made examination of the lots in question.

Hamlin's Testimony.

SAMUEL HAMLIN testified as follows: I was city engineer of Hot Springs. Lot No. 9 is 54 feet front on Malvern street; extends back 105 feet on Benton street and 90 feet on the south side of the lot. Lot No. 1 fronts 54 feet on Malvern street, on Valley street 19 feet, and 125 feet on Benton street. On the north side of lot one the line is 150 feet in length. Lot No. 2 fronts 50 feet on Valley street. The lots are below the grade on the west side, fronting Valley street. The upper or east side of lots 1 & 2, also lot No. 9, are up to the grade. The embankment stands about three feet above the
26 grade of Benton street, and is extended on the same level as the right of way.

Pace's Testimony.

F. C. PACE testified as follows:

The embankment is 8 or 9 feet high at present. It injures lot 9 about ½; did not think it injured lots 1 & 2 so much. Lot No. 9 was worth $20 per foot front previous to the building of the embankment; was worth more than that after the building of the depot. I owned the second lot south of lot No. 9, which I sold to Mr. H. R. Whittington.

Stitt's Testimony.

S. H. STITT testified that lot No. 9 is valuable property, and is considerably injured. I am not sure the embankment would depreciate the value of lots 1 & 2.

The foregoing was all the testimony introduced by the plaintiff.

The defendant introduced the following evidence:

French's Testimony.

GEO. M. FRENCH testified as follows:

The turn-table is situated in part on the right of way granted by Congress to defendants and in part on lots 10 & 11, in block 69. It is about 40 feet east of the west end of the right of way granted by Congress and about the same distance east of plaintiff's lots.

The embankment is about an average length of 100 feet, being longer at one side than at the other, and is used by the defendant for tracks. It is on the same grade as the right of way east of it; could not be constructed and used on a lower grade at that point,
27 and is properly and skilfully constructed. The depot-house, the tracks, & turn-table, which are located on the right of way, are such as are used at terminal stations, and they are all re-

quired in the usual and necessary operations of a railroad. Without the turn-table the train could not be run on the right of way within the city of Hot Springs without great damage (danger) to life and property, for without the engines could not be turned and would have to be run in back motion either in departing from the depot or coming to it. This would be specially dangerous at night, as the head-light could not be seen while the engine was in back motion. I do not think the plaintiffs' lots are injured. Lot 9 was worth 20 or $25 per foot before the improvements were constructed on the right of way between Cottage street and Malvern avenue. Just after the completion they were worth $50, and are now worth $100 per foot. Lots 1 & 2 are about of the same value. The lots of the plaintiffs were benefited by the proximity of the depot and the embankment. The lot 9 is rendered especially valuable as a business lot, for the reason that freights could be unloaded into the house. Lots 1 & 2 are rendered more valuable. They are the best lots in town for a hotel, by reason of the proximity of the depot and other improvements in Benton street. The depot, turn-table,
28 and embankment were constructed about two years ago and are all constantly used for railroad purposes. I am a civil engineer and do work of that character for the defendant. The general value of property in Malvern street has been enhanced by the location of the depot.

Witness was here shown a map of the Hot Springs commission, which he identified and stated that the black line just south of the street line of old Gaines avenue was the line of the right of way of the r'road company as surveyed by Clark, the engineer of the Hot Springs commission, and the western terminus of such right of way so surveyed is 200 east of the western terminus of the present right of way, at the western end of the embankment. The depot, turn table, and track are all in the location of old Gaines avenue. I surveyed all the streets, blocks, and alleys of the Hot Springs reservation previous to the Hot Springs commission, in 1875.

Moscowitz & Others' Testimony.

H. Moscowitz, A. S. Cuthbert, & A. J. Hill testified that said lot 9 and 1 & 2 were enhanced in value by the construction of the embankment in Benton street; that lot 9 was especially valuable for business purposes by reason of its proximity to the railroad and increased facility for handling freights. Lots 1 & 2 were rendered peculiarly desirable for hotel and business purposes; that the embankment and improvements do not injure their value. Property on Malvern street has been enhanced by the location of the depot.
29 There has been a general and rapid increase in the value of property in Hot Springs during the last 4 years, and lots 1, 2, & 9 have shared in that increase equally with the property in the vicinity and has increased in the same ratio.

A. Whittington et al.'s Testimony.

ALF. WHITTINGTON and W. S. MCTAGNE testified that lots 1 & 2 & 9 had not deteriorated in value but had enhanced in value since the construction of the improvements by the defendant in Benton street. The proximity of the r'road and depot has been a benefit to them by their nearness. There has been a general increase in value of lots in that part of town and these lots have increased in the same ratio as others. They are much more valuable since the construction of the improvements and would be injured by their removal. When I say they would be improved in value by the improvements I do not refer to the embankment. I do not say that the embankment was an improvement.

Ledwidge's Testimony.

P. J. LEDWIDGE testified that lot No. 9 was damaged 25 per cent. by reason of the embankment, which was objectionable, and the lot would be worth more if it was away, but the other improvements were a benefit. While the property on the main street increased in a ratio of 100 per cent. those lots increased in a ratio of 75 per cent.

H. A. Whittington's Testimony.

H. A. WHITTINGTON testified: I own lots near lots 1 & 2 & 9. There has been a general increase in the value of lots in the vicinity. I cannot fix values. I think lot 9 would be increased more but for the bridge in Benton street (meaning the embankment); that the bridge referred to does a damage to the lots, particularly the lower lot, but the r'road constructed to the point at the the end of the right of way granted by Congress improved the property if the bridge or embankment had not been added, which was a damage.

This was all the testimony introduced by the defendant.

C. S. Williamson Dropped from Complain- & His Evidence Excluded

After the testimony in said cause was closed and the instructions had been settled, and after the court had directed counsel to proceed to address the jury, the plaintiff asked and obtained leave to drop the name of C. S. Williamson from the complaint and asked the court to exclude the evidence of said party from the jury, which was accordingly done and the jury instructed to disregard the evidence of said witness.

Plaintiff's Instructions.

The plaintiff asked the following instructions, viz:

I. The court instructed the jury that the right to use streets in a city by the adjoining lot-owners is property and a right of way be-

longing to the owner of said lots, and that no such right can
31 be taken or injured or appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money or secured to him by a deposit of money, which compensation is irrespective of any benefit from any improvement made by said corporation. Louisville & Big S. R. R. *vs.* Combs, 19 Amer. Rep., 76; cons. of Ark., art. 12, sec. 9; do. article 2, sec. 22; 2 Dillon, p. 620, sec. 625, note.

II. The city of Hot Springs had no right to pass an ordinance granting the defendant a right of way along Benton street, and defendant could acquire no right to build any permanent structure or lay its track thereon by virtue of such ordinance. Const. 1874, art. 2, sec. 23; act 1874, p. 9, sec. 14; Angell on Highways, sec. 7058; Dillon on Municipal Corp.; Cooley on Const. Lim., p. 681, sec. 545.

III. The court instructs the jury that the measure of damages to adjacent property caused by the use of a street as a site for a railroad is the diminution of the value of the property, and the recovery may include prospective as well as past damages when the obstructions to the use of the street are of a permanent nature. E. & L. Big S. R. R. *vs.* Combs, 19 Amer. Rep., p. 74.

Garland Circuit Court.

CURNEL S. WILLIAMSON and FANNIE G. WILLIAMSON, Plaintiffs,

vs.

32 THE HOT SPRINGS RAILROAD CO., Def't.

Cou-t's Instruction.

The court instructs the jury—

1. That if they believe from the evidence that the defendant, by its agents or employees, constructed in Benton street, between lot 9, in block 69, & lots 1 & 2, in block 78, in the city of Hot Springs, a permanent embankment as a road-bed on which to lay & extend its railroad track, & then or before the commencement of this suit placed and fixed its track permanently upon said embankment, as charged in the complaint; that said lots or any of them were or are permanently injured or damaged thereby, and that said lots were then and still are the property of the plaintiff, Fannie G. Williamson, they must find in her favor, &, in such case, the difference between the present value of the lot or lots so damaged with the embankment and the said track thereon existing and what such value would be if the embankment and said track were removed or had never existed is the measure of damages.

Defendant Excepts.

And which were given; and to the giving of said instructions the defendant at the time excepted.

Defendant asked the following instructions, viz:

Defendant's Instruction.

The plaintiffs allege that the defendant has unlawfully obstructed Benton street by the construction of the embankment and
33 turn-table complained of and the occupancy of said street by its road-bed and improvements, to the injury of plaintiffs and other owners of lots adjoining said street, and seeks to recover damages by reason of the alleged injury thereto. If the allegations of the complaint are true the obstructions complained of are a public nuisance, and, the injury alleged being common to all owners of lots adjacent to that street, the plaintiff cannot maintain a private action therefor, and you will therefore find a verdict for the defendant.

2. The right of way was granted by Congress to the defendant from a point on the eastern boundary of the Hot Springs reservation to the old Malvern stage road within said reservation. The grant carried with it the right to erect and maintain all suitable structures usual and necessary to the operation of a railroad, including a depot, station-house, and such tracks and other improvements of that nature as are necessary to the proper and convenient dispatch of its business; and if you find that the turn-table and other improvements complained of or any part of them are within the right of way granted by Congress to the defendant as aforesaid, and are necessary to the operation of its road, and such as are usual
34 at terminal stations, you cannot find for the plaintiffs by *by* reason of any damage caused to their lots by such improvements.

3. The streets and alleys were ceded by Congress to the city of Hot Springs for the use of the public, and if the city, with the sanction of the Legislature, granted a railroad company the right to construct and operate its road thereon such company will not be liable to an abutting lot-owner for consequential damage unless it result from a negligent and improper construction of the road. It is not alleged in this case that the defendant's road was negligently or unlawfully constructed; therefore if you find that the city of Hot Springs by one or more ordinances adopted prior to the 1st day of March, 1883, granted the defendant the right of way upon Benton street between plaintiffs' lots, and that the embankment and other structures complained of or any of them are located thereon, you will not find for the plaintiff by reason of any damage caused to their lots by said embankment and such improvements.

4. The defendants have pleaded a misjoinder of parties by the joinder of C. S. Williamson with his wife as a plaintiff. If you find from the patent or the evidence introduced in this cause that the plaintiff, Fannie G. Williamson, is the owner and acquired
35 title to the lots described in the complaint during or since the year 1876 you will find a verdict for the defendant.

5. If the jury believe from the evidence that the market value of plaintiffs' lots is not impaired or depreciated by the construction and operation of the railroad in Benton street they will find for the defendant. If, on the other hand, they believe the value of the lots

is diminished, and that the plaintiffs are entitled to recover therefor, the measure of damages is the difference in the market value of the lots immediately preceding and immediately after the construction of the road.

6th. If the jury find for the plaintiff- the measure of damage is the injury caused to the lots by the obstruction in Benton street down to the time of the institution of this action. They will not assess damages for any prospective injury beyond that time.

5 Inst'n Modified.

The 5th instruction as asked and modified by the defendants:

If the jury believe from the evidence that the market value of plaintiffs' lots is not impaired or diminished by the construction and operation of the railroad in Benton street they will find for
36 the defendant. If, on the other hand, they believe the value of the lots is diminished, and that the plaintiffs are entitled to recover therefor, the measure of damage is the difference in the market value of the lots with the improvements and obstructions placed by defendant in Benton street and what it would be without such obstructions.

Defendant's Instructions Refused.

The court refused to give the 1st & 2d, 3rd, 4th, and 6th of said instructions and refused to give the 5 instruction, except the following part thereof, viz:

"If the jury believe from the evidence that the market value of plaintiffs' lots is not impaired or depreciated by the construction and operation of the railroad in Benton street, they will find for the defendant."

Modification of & Refusal to Give 6th Inst.

Defendant thereupon modified said instruction and asked the court to give it as follows:

If the jury believe from the evidence that the market value of plaintiffs' lot is not impaired or depreciated by the construction and operation of the railroad in Benton street, they will find for the defendant. If, on the other hand, they believe the value of the lots is diminished, and that the plaintiffs are entitled to recover therefor, the measure of damages is the difference in the market value
37 of the lots with the improvements and obstructions placed by the defendant in Benton street and what it would be without such obstructions.

Exceptions.

Which the court refused to do, and to the refusal to give said instructions said defendant at the time excepted.

Mo. for New Trial.

Defendant filed its motion for a new trial as follows:

Garland Circuit Court.

C. S. WILLIAMSON & FANNIE G. WILLIAMSON *vs.* H. S. R. R. Co.

The defendant moves the court to set aside the verdict and grant it a new trial for the following causes:

1st. The court erred in granting (giving) the instructions asked by plantiff.

2nd. It erred in refusing the instructions asked by defendant.

3d. It erred in permitting the pl'ff, C. S. Williamson, to testify against defendant's objection.

4th. The verdict is contrary to the law and the evidence and is excessive.

J. M. MOORE, *Att'y.*

Endorsed: C. S. Williamson *et al. vs.* H. S. R. R. Co. Mot. for new trial. Filed Nov. 1st, 1883. Z. Belden, cl'k.

38 Which was by the court overruled, and to the overruling of the same defendant excepted.

Defendant filed a motion in arrest of judgment as follows:

Mo. in Arrest.

Garland Circuit Court.

G. S. & FANNIE G. WILLIAMSON *vs.* H. S. R. R. Co.

The defendant moves the court to arrest the judgment rendered in said cause, because, it says, the complaint does not state facts sufficient to constitute a cause of action.

J. M. MOORE, *Att'y.*

Endorsed: C. S. Williamson *et al. vs.* H. S. R. R. Co. Mo. in arrest. Filed Nov. 1, 1883. Z. Belden, cl'k.

Which was overruled; and to the overruling of said motion defendant excepted; and defendant here now brings into court its bill of exceptions, and asks that the same be signed and sealed by the judge of this court and filed as a part of the record in said cause, which is accordingly done.

C. B. WOOD, [SEAL.]
Judge of the 7th Judicial Circuit of Arkansas.

Endorsed: C. S. Williamson & Wife *vs.* H. S. R. R. Co. Bill of exceptions. Filed December 11th, 1883. Z. Belden, cl'k.

39 February Term, 1883.

Be it remembered that at a regular term of the Garland circuit court of Garland county, Arkansas, which was begun and held, at the court-house, in the city of H't Springs, said county and State, on Monday, the 5th day of February, 1883 said day being the day prescribed by law for holding a term of said court, there was present and presiding the Hon. F. T. Vaughan, by virtue of the following agreement:

Agreement for Exchange of Circuits and Holding Courts.

Be it known that we, Frank T. Vaughan, judge of the 6th judicial circuit of the State of Arkansas, and James B. Woods, judge of the 7th judicial circuit of said State, do hereby agree to exchange circuits and hold courts for each other for and during the following period: Such exchange to begin on the 1st day of February, A. D. 1883, and to terminate on the 4th day of March, 1883.

F. T. VAUGHAN,
Judge 6th C't.
J. B. WOOD,
Judge 7th C't.

Ordered that court be proclaimed open pursuant to law, which is accordingly done by the sheriff of Garland county, when the following proceedings were had, to wit:

And afterwards, on February 22nd, 1883, the same being a subsequent adjourned day of said term of said court, among
40 other the following proceedings were had, to wit:

Filing Answer.

C. S. WILLIAMSON *et al.*, Pl'fs,
vs.
HOT SPRINGS RAILROAD CO., Def't.

Come the parties hereto, by their respective attorneys, and, upon leave had, said defendant files its answer herein.

September Term, 1883.

Be it remembered that at a regular term of the Garland circuit court, which was begun and held, at the court-house for said county, on Monday, September 24th, 1883, said day being the time prescribed by law for holding a term of said court, there was present and presiding the Hon. James B. Wood, judge of the 7th judicial circuit, of which the county of Garland forms a part, when the following proceedings were had, to wit:

Ordered that court be proclaimed open pursuant to law, which was accordingly done by the sheriff of Garland county.

And afterwards, on Tuesday, Oct. 30th, 1883, the same being a subsequent adjourned day of said term of said court, among other the following proceedings were had, to wit:

Jury Trial.

G. S. WILLIAMSON and FANNIE G. WILLIAMSON, Plaintiffs,

vs.

THE HOT SPRINGS RAILROAD COMPANY, Defendants.

41 Now, on this day, come said plaintiffs, *and* by attorneys, G. W. Murphy, Esq., and R. G. Davies, Esq., and comes also said defendant, by attorney, J. M. Moore, Esq., and, upon leave had, said defendant files an additional paragraph to its answer heretofore filed herein; and, this cause being called for trial, said parties announced themselves ready for trial, and it is ordered that a jury come; whereupon come Thad. Taylor, C. N. Rix, P. Bungauer, W. B. Singleton, J. M. Spence, James Madison, J. Weis, W. H. Oglesby, A. Roper, P. E. Green, W. L. Clay, & C. P. Murph, twelve of the regular panel of petit jurors, who are duly sworn and examined and found competent, and are duly accepted by said plaintiffs and by said defendant as a trial jury in this case; and a part of the evidence being introduced, and it now being late and there not being time on this day to conclude the trial of this cause, it is ordered that the further consideration of this cause be deferred until to-morrow morning at 8.30 o'clock, and the jury herein are allowed to separate for the night under the admonition of the court.

And afterwards, on Wednesday, October 31st, 1883, the same being a subsequent adjourned day of said term of said court, among other the following proceedings were had, to wit:

42 C. S. WILLIAMSON and FANNIE G. WILLIAMSON, Pl'fs,

vs.

THE HOT SPRINGS RAILROAD COMPANY, Def't.

Come the parties, by their respective attorneys, and come also the jury, heretofore selected in this cause, and the trial of this cause is resumed, and all of the evidence on the part of the plaintiff and defendant is introduced and concluded; and therefore, on motion of said plaintiff, it is considered and ordered by the court that the name of C. S. Williamson as one of the plaintiffs in this suit be stricken out and that this cause progress in the style of Fannie G. Williamson, plaintiff, against The Hot Springs Railroad Company, defendant; and the jury, hearing the argument of the respective attorneys and receiving the instructions of the court, retired to consider of their verdict, and afterwards said jury returned into open court and rendered the following verdict, to wit:

Verdict.

"We, the jury, find for the plaintiff, and assess the damage at $2,275.

THAD. TAYLOR, *Foreman.*"

Judgment.

It is therefore considered and adjudged by the court that the said plaintiff, Fannie G. Williamson, do have and recover of and from the said defendant, The Hot Springs Railroad Company, the said sum of two thousand two hundred and seventy-five ($2,275)
43 dollars as damages, and also all her costs herein named, and execution issue therefor.

And afterwards, Thursday, November 1st, 1883, the same being a subsequent adjourned day of said term of said court, among other the following proceedings were had, to wit:

Filing & Overruling Mo's in Arrest & for New Trial & Exceptions.

FANNIE G. WILLIAMSON, Pl'ff,

vs.

THE HOT SPRINGS RAILROAD COMPANY, Def't.

Come the parties, by their respective attorneys, and, upon leave had, said defendant files its motion in arrest of judgment herein, and also files its motion for a new trial herein; and thereupon the said motion of defendant in arrest of judgment, being submitted, is, by the court, overruled; to which ruling of the court defendant excepts; and thereupon the motion of said defendant for a new trial herein is submitted, and is also by the court overruled, and to the ruling of the court in overruling its said motion for a new trial said defendant, by attorney, excepts; and thereupon said defendant prays an appeal to the supreme court of the State of Arkansas from the judgment of the court in this cause; which appeal is by the court granted.

44 STATE OF ARKANSAS, } *ss:*
County of Garland, }

I, Zeba Beldin, clerk of the circuit court of said county, in said State, do hereby certify that the foregoing fifty-two pages contain a true and complete transcript of the record in the case of C. S. Williamson and Fannie G. Williamson against The Hot Springs Railroad Company as the same appears from the records in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office this 26th day of January, 1884.

Z. BELDIN, *Clerk.*

Proceedings in Supreme Court.

To L. E. Barber, cl'k sup. c't:

The defendant, Hot Springs Railroad Company, prays an appeal from the judgment in this cause to the supreme court.

J. M. MOORE, *Att'y.*

Feb'y 22, '84.

The appeal above prayed for is granted.

L. E. BARBER, *Clerk,*
By P. D. ENGLISH, *D. C.*

Transcript filed February 22d, 1884.
Summons issued and returned executed.
Supersedeas bond filed as follows:

Supersedeas Bond.

Whereas the appellant, Hot Springs Railroad Company, has taken an appeal from the judgment of the Garland circuit court,
45 rendered at its September term, 1883, against it in favor of the appellee, Fannie G. Williamson, for the sum of twenty-two hundred and seventy-five dollars, with cost, and the appellant desires to supersede said judgment: Now, J. M. More, sure*ties*, hereby covenants with the said appellee that the said appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that he will satisfy and perform said judgment in case it shall be affirmed and any judgment or order which the supreme court may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid (and also pay all rents or damages which during the pendency of the appeal may accrue on any part of the property of which the appellee is kept out of possession by reason of the appeal).

Witness our [my] hands this 22d day of Feb'y, 1884.

J. M. MOORE.

Approved & filed Feb'y 22, 1884—L. E. Barber, cl'k, by B. D. English, D. C.—and writ of supersedeas issued.

Suggestion of Diminution & Mo. for Certiorari.

Comes the appellant and suggests a diminution of the record in said cause, in this, to wit: The clerk has neglected to append to the agreed statement of facts embodied in the bill of exceptions the copy of a map of the appellee's lots and of appellant's right of way in the city of Hot Springs and the depot and obstructions
46 complained of in the complaint in said cause, and appellant prays for a writ of certiorari to the clerk of said court requiring him to supply said record.

J. M. MOORE, *Att'y.*

Writ of Certiorari.

The fo'wing writ of certiorari was issued:

To the clerk of the circuit court of Garland county, greeting:

Whereas, in a case pending in the supreme court of the State of Arkansas, wherein the Hot Springs Railroad Co. is appellant and Fannie G. Williamson is appellee, it has been suggested by said appellant that there is a diminution of the record filed in this case, in this, that the clerk has neglected to append in the agreed statement of facts in the bill of exceptions the copy of a map of the appellee's lots and of appellant's right of way in the city of Hot Springs, and the depot and obstructions complained of in the complaint in said cause, with a prayer that the record be amended, you are, therefore, hereby commanded that you certify to our supreme court without delay a full, true, and complete transcript of the record of said circuit court so as above suggested to be diminished, that our supreme court, upon consideration of a complete record, may cause to be done therein what should be done. Hereof fail not and make due return of this writ under your official seal.

In testimony wher-of I, Luke E. Barber, clerk of said su-
[L. S.] preme cout, hereto set my hand, at the city of Little Rock, and affix the seal of said court this 13th day of April, 1885.

47 L. E. BARBER, *Clerk.*

Return of Certiorari.

In obedience to the accompanying writ of certiorari I hereby certify that the foregoing are true and correct copies of the maps introduced in evidence in said cause and referred to in the agreed statement of facts and in the bill of exceptions filed therein.

[L. S.] Witness my hand and the seal of said court this 14th day of April, 1885.

Z. BELDEN, *Clerk.*

Maps.

Submission.

MAY 16, A. D. 1885.

Come said appellant and appellee, by their attorneys, and this cause is submitted upon the briefs filed, and by the court taken under advisement.

Judgment of Supr. Court.

JANUARY 2D, A. D. 1886.

This cause came on to be heard upon the transcript of the record of the circuit court of Garland county, and was argued by
48 counsel; on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed, with costs; and it appearing to the court that said appellant, with J. M. Moore as surety, has filed a supersedeas bond in this cause, it is further considered that said appellee recover of said appellant and J. M. Moore the sum of two thousand two hundred and seventy-five dollars, with interest thereon from the 31st day of October, A. D. 1883, the amount of judgment in said circuit court, and the further sum of two hundred and twenty-seven dollars and fifty cents, being ten per cent. thereon, and costs.

It is further considered that said appellee recover of said appellant and said surety all her costs in this court in this cause expended and have execution thereof, as well as of said judgment and her costs in the circuit court.

And the court delivered the following opinion:

Opinion of the Sup. Court.

Congress granted a right of way to the Hot Springs Railroad Company, by act of March 3d, 1877, through the Hot Springs
49 reservation. The road was located and built through the city of Hot Springs, along the line of Benton street, the right of way occupying one hundred feet on the south side of it. This right of way lacked 130 feet of extending to the intersection of Malvern avenue, which is the western terminus of Benton street. On June 16th, 1880, the U. S., through Congress, ceded to the city of Hot Springs the streets and other thoroughfares of the city for public use, and thereafter the city, by an appropriate ordinance, granted the railroad company a right of way from the western terminus through Benton street to the intersection of Malvern avenue. The company extended its road-bed upon this additional right of way, making for that purpose an embankment in the street 50 feet wide and from three to four feet above the grade of the street, the center thereof being in a direct line with the center of the congressional right of way. The sides of the embankment were masonry, presenting solid granite walls and preventing any use whatever by the public of so much of the street as is occupied by it.

The appellee is the owner of the premises on the two corners, next the railroad, of Benton street and Malvern avenue. The lots on the north side of the street front — feet on Malvern
50 avenue and — feet on Benton street, the others 105 feet on Benton street and 54 feet on Malvern avenue. The embankment occupies a space between the two pieces of property, leaving twenty-five feet of open street between it and the premises on the south side of the street and sixty-five feet between it and the premises on the north side. The proof showed that the extension of the road-bed was elevated above the grade of the street in order to bring the new tracks upon a level with the old; that the south side of the street just east of the appellee's premises on that side was blockaded by the appellant by a turn-table placed within its congressional right of way, so that the embankment not only narrowed the street

next to these premises, but also made it necessary for her to
51 take a circuitous route around the west end of it in order to gain access to her premises on the south side of the street when approaching from the east, and that these facts depreciated the value of the premises on both sides of the street. The appellee sued the company for this injury and recovered judgment for $2,275.

The company requested the court to instruct the jury as follows, viz:

"The streets and alleys were ceded by Congress to the city of Hot Springs for the use of the public, and if the city, with the sanction of the Legislature, grants a railroad company the right to construct and operate its road thereon such company will not be liable to an abutting owner for consequential damages unless it results from the negligent and improper construction of the road. It is not alleged in this case that the defendant's
52 road is negligently or improperly constructed. Therefore if you find that the city of Hot Springs, by one or more ordinances adopted prior to the first day of March, 1883, granted defendant the right of way upon Benton street between plaintiffs' lots, and that the embankment and other structures complained of or any of them are located thereon, you will not find for the plaintiffs by reason of damages caused to their lots by said embankment and such improvements."

The court refused this and charged the jury that the appellee was entitled to recover the amount her property was diminished in value, if the facts were found as stated. The counsel for the appellant submits that this action of the court raises this question:

"Where the fee of the streets is in the city and it grants a
53 a right of way to a railroad company to construct its road along a street, pursuant to an act of the Legislature authorizing such use of the street, and the track is laid in a proper and skillful manner, is the corporation liable for consequential damages to abutting lot-owners?"

The cases sustaining the position assumed by the appellant have arisen mainly under the familiar constitutional restriction that private property shall not be taken for public use without compensation, and the decisions have generally turned upon what is a taking of property within the meaning of this provision. When the title of an owner of real estate abutting upon a street which is appropriated in whole or in part by a railroad extends to
54 the center of the street the cases concur in sustaining his right to recover not only for the fee in the street, which is actually taken, but also for the consequential damages done his abutting premises. But when the fee to the street is in the public and the Legislature, having no other restraint laid upon it, has sanctioned its use by a railroad the weight of authority is that the abutting owner of real estate can recover nothing unless the *corpus* of his premises is actually invaded in some way. In other words, if an inconsiderable part of his estate is taken the owner may recover the incidental damage done to the whole, but he can recover

nothing, even though the incidental damage to his estate be equally great, if nothing is taken. When this rule was promulgated the kind of consequential injuries here complained of, it is said,
55 had, perhaps, no existence. Now, the consequential injury may amount to an absolute destruction of value. Many judges, while adhering to the rule, have condemned the practical injustice of it and have commended a change to the law-making power.

Our constitution, adopted in the light of the injustice that may result from an enforcement of the rule, has placed an additional limitation upon the right of eminent domain. The bill of rights does not stop at a simple prohibition against the taking of private property for public use without compensation. To this guaranty, which was found in the constitution of 1868, the framers of the constitution of 1874 added another, to wit: That private property shall not be damaged for public use without compensation, and now
56 the fundamental law is, "Private property shall not be taken, appropriated, or damaged for public use without just compensation." Under this enlarged provision our enquiry is no longer limited to the question, Has private property been taken for public use? and it is useless to recur to cases which are confined to the interpretation of a clause containing that limitation only. A provision similar to that in our constitution is found in the constitutions of Illinois, Colorado, Georgia, Nebraska, California, West Virginia, and Pennsylvania, and in each of these States it has been held by the courts of last resort that this addition to the old provision against taking private property without compensation was intended
57 to afford redress where none could be had before. Pusey *v.* City of Allegheny, 98 Pa. St.; City of Reading *v.* Althouse, 93 *ib.*, 400; Reardon *v.* San Francisco, 7 A. & E., Cor. Cases, 454; Harman *v.* Omaha, *ib.*, 474; Gottschalk *v.* R. R., 14 Neb., 550; R. R. *v.* Fellers, 16 *ib.*, 169; Rigney *v.* Chicago, 102 Ill., 64; Atlanta *v.* Green, 67 Ga., 386; Denver *v.* Boyer (Col.), 23 Am. Law Reg., 440; Molandrin *v.* M P. R'y, 14 Fed. Rep., 394; Johnson *v.* Parkersburg, 16 W. Va., 402; Hutchinson *v.* Parkersburg, 25 *ib.*, 726; Transportation Co. *vs.* Chicago, 99 U. S., 635.

An examination of the cases will show that it may now be taken as settled that when this provision prevails it is no longer necessary that there should be a physical invasion or spoliation of one's lands in order to give a right of recovery. As was said in Reardon
58 *v.* San Francisco, *sup.*, "It will occur to any one reflecting on the import of the clause that if it was not an additional guaranty to the usual one its insertion was idle and unmeaning." The decisions are not in accord, however, as to the extent of the injury for which the right of action is given.

In England the railway clauses consolidation acts recognize a right of action in persons whose property has been "injuriously affected" by the building of a railroad. Under these acts the British judges have usually held that no injuries were actionable except those for which the common law would have afforded a remedy if the act causing the injury had not been authorized by Par-

59 liament. The supreme court of Illinois place a like construction upon the provision of their constitution. Other courts have ruled that the redress intended by a similar provision is not restricted to cases which are actionable as at common law. Cases *sup.*

The determination of this appeal does not render it necessary for us to enter upon the consideration of this question, because if we conclude to say with the Illinois and English courts, interpreting words similar in meaning to those in our constitution, that such language recognizes a right to recover only where it would have existed at common law, or if we interpret the provision as recognizing a new right of action, as some of the State courts have done, the appellee, in either event, is entitled to compensation. An examination of a few of the decisions adopting the more re-
60 strictive interpretation of this provision will be sufficient to show this.

The effect of this provision of the constitution was before the supreme court of Illinois repeatedly prior to the case of Rigney *v.* Chicago, 102 Ill., 64. In that case the court reviews its former rulings and attempts to settle the question definitely. It is said: "Under the constitution of 1848 it was essential to a right of recovery, as we have already seen, that there should be a direct physical injury to the *corpus* or subject of the property, such as overflowing it, casting sparks or cinders upon it, and the like; but under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of use or enjoyment by which
61 the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provisions, give a right of action." Again, at page 80:

"The question then recurs, What additional class of cases did the framers of the new constitution intend to provide for which are not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns and cities which directly impair the value of private property for which the law does not and never has afforded any relief.

* * * * * * *

"So as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property and thereby impair its value no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any stat-

utory or constitutional provisions on the subject the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."

62 In the last Illinois case on the subject the court, following Rigney *v.* Chicago, sustained a recovery for consequential damages against a railroad upon facts similar to but not as strong for the plaintiff as those in this case. C. & W. I. R'y *v.* Ayers, 106 Ill., 511. The result was the same as in the Nebraska cases *sup.*, Denver *v.* Boyer and Molandrin *v.* R'y, *sup.*

The English cases have recently undergone an exhaustive review in the House of Lords in the case of the Caledonia R'y *v.* Walker's Trustees, reported in 35 Moak, 177. Opinions were delivered by several of the Lords, in which they do not quite agree as to the import of former decisions, but all concur in the opinion that where access to private property is interfered with by the construc-

63 tion of a railroad and the value of the property, irrespective of any particular use which may be made of it, is so dependent upon the existence of that access as to be substantially diminished by the obstruction the owner is entitled to compensation.

In that case the claimant's property was not situated on the street that was obstructed, and this fact would tend to render the case less formidable for a recovery than the case at bar; but the claimants were permitted to recover, Lord Selbourne saying, "A recovery was sustained in Beckett's case, Law Rep., 3 C. P., 82" (approved in McCarthy's case, Law Rep., 7 H. L., 243), "because the width of the public road immediately opposite the plaintiff's premises was re-

64 duced so as to render it not useless to those premises for the purpose of access, but less convenient than before. In McCarthy's case," he continues, "this house gave compensation for the obstruction of access to the River Thames from the plaintiff's premises through a public dock lying on the other side of a public road adjoining those premises. It was argued for the appellants that these authorities ought not to be extended to any case of the obstruction of access to private property by a public road when such obstruction is not immediately *ex adverso* of the property. This limitation, however, seems to me arbitrary and unreasonable and not warranted by the facts either of Chamberlain's case (2 B. & S., 617) or of McCarthy's case." And it was held sufficient for a recovery if the right of access was proximate and not remote or indefinite.

65 In the same case, Lord O'Hagan says of the McCarthy case: "In that case as in this there was a public way, and in that as in this access to it was obstructed by the works complained of. There as here the obstruction produced inconvenience to the general public, who had the use of the way, but there as here there was an additional and appreciable damage to the premises of an individual, rendering them less available for his purposes, and therefore diminishing their value. Then the premises were pronounced to have

been "injuriously affected," and the proprietor to have suffered damage to his estate, although no land was taken from him and although no land of his was touched, the physical obstruction of access being deemed in itself an injury to the premises
66 which it damnified within the meaning of the compensation clauses."

In Widder *v.* Buffalo R'y, 29 Up. Can., 2 B., 154, the court says: "The plaintiff's land has a frontage on the river Maitland, which appears to be a public navigable river. To this river the plaintiff had access from his land. The defendants have excluded him from access to it except by the inconvenient method of crossing their railway embankment. * * * This, I have no doubt, is injuriously affecting the land of the plaintiff the same as if plaintiff had been cut off by an embankment from the public highway. * * * In every case which has been cited, or which is referred to in those cited, it is stated as unquestioned in law that where there
67 has been an act done making the land of the claimant 'inaccessible by raising the ground immediately in front of it,' referred to by Lord Cranworth in Ricket's case (2 H.L., 175), or 'by the right of access to or from the highway being taken away,' per Boville, C. J., in Beckett's case, *sup.*, the claimant is entitled to compensation; and many other passages might be cited to the same effect."

This is sufficient to show the certain drift of the authorities. In every instance it is said the recovery can be had only when the owner has sustained a special injury to his land—a damage not common to the public. It is not sufficient to defeat the right, however, that a large number of persons suffered special damage. If so, it would only be necessary for the company, where an injury
68 has been inflicted upon one for which damage should be awarded, to inflict a like injury on many others in order to escape liability. No individual can recover for the general public inconvenience. But all the cases agree that this special damage is done by the erection of an embankment in the street *ex adverso* the owner's premises. See Mills' Em. Dom., §§ 206–'7.

That was the gist of the complaint in this action and the point of enquiry to which the proof was directed. The preponderance of the testimony showed that the embankment was a direct and special injury to the appellee's property, and this is apparent from the statement of the facts. The injury from the embankment was in-
69 creased by the fact that all access to the appellee's premises was excluded to persons approaching from the east on Benton street.

The refusal of the court to charge the jury in effect that the appellant was not liable for any injury resulting from the works constructed on the right of way granted by Congress is assigned as error.

It was claimed by the appellee that the turn-table of the appellant, which was located in part upon the right of way and in part upon a lot owned by the appellant, wholly obstructed Benton street at the east end of her lot on the south side of the street. No claim for

damages was made by reason of the construction of a road-bed and track upon the congressional right of way, but only for this obstruction.

70 It is contended that the right of way did not constitute a part of Benton street, and that the public had no rights therein, but that the railroad company has the exclusive right to the use and enjoyment of the entire width of the right of way.

This question involves the construction of the act of Congress of March 3d, 1877, which is the appellant's grant of right of way. The act has relation to the Hot Springs reservation. The title to this property had recently been adjudged to be in the U. S. For more than a half a century it had been claimed by individuals under the belief that the Government had parted with its title. A prosperous town had grown up upon it, with all of the incidents of business and social interests. Congress, in the act aforesaid, undertook to

71 mitigate the hardships that would naturally follow a strict enforcement of the Government's legal rights. It gave the claimants of the property a pre-emption right to the land occupied by them. It recognized the existence and location of the city of Hot Springs, of its streets, alleys, and thoroughfares. It empowered the commissioners, whose office was created by the act, among other things, to straighten or widen existing streets and to lay off and open such additional streets as the convenience of the public and the interest of the Government might require. The appellant's rights are then granted and defined. The 17th section is as follows:

"That the right of way be, and is hereby, granted to the Hot Springs Railroad Company, a company duly incorporated

72 and organized under the laws of the State of Arkansas, to construct, maintain, and operate its line of railroad upon, over, and across the Hot Springs reservation, in the State of Arkansas, as follows." Data and points are then given for locating the right of way through the reservation and into the city, and section 18 fixes its width at 100 feet.

This is all there is in relation to the right of way. A proviso was added to the effect that the railroad might purchase lands, not to exceed 20 acres, for shops, depots, and other purposes, on the same terms as individuals.

It is a conceded fact in this case that Benton street was one of the original streets of the town of Hot Springs and was still used as such at the time of the passage of the act. It was then only 80

73 feet wide, and the entire space of the old street is now covered by the railroad right of way, leaving an open street of 40 feet north of the right of way. This results from the fact that the commissioners increased the width of the street to 140 feet. This fact is apparent from the official map made in pursuance of the act of Congress, a copy of which accompanies the bill of exceptions. Lots and blocks are laid out on each side, as upon other streets, with 140 feet intervening between them, with no means of egress other than through this street; and the street had an unobstructed width of 140 feet from its western terminus to the appellant's congressional

right of way before the railroad, by treaty with the city, extended its track over it.

This view was also entertained by the company, for it pro-
74 cured the passage of an ordinance by the city and entered into a contract with the city authorities to gain the privilege of erecting its depot and turn-table in the street within the limits of the right of way granted by Congress.

There is nothing in the record to sustain the appellant's contention that it was the intention of the commissioners to abandon any part of this street.

Whether Congress fixed the right of way by such data that any competent engineer would have located it without variation from the line finally adopted the proof does not disclose, but we are informed that the location was approved by the Hot Springs commissioners. It was not one of the duties of the commissioners under the act to locate the right of way, but we are not apprised of
75 any legal objection that can be urged to the location. We have, then, this result: The act recognizes the usual rights of the public in the streets of Hot Springs as finally laid out by the commissioners, and at the same time grants the railroad a right of way through one of these streets.

It is the duty of the courts to construe the several provisions of the act together without annulling any of its parts, if this can be done consistently.

We see no difficulty in giving effect to the several parts of the act pointed out and harmonizing the rights of the land-owner and the railroad in the street. There is nothing in the act to indicate an intention on the part of Congress to invest the railroad with an absolute title to any part of the strip of land upon which its
76 road was to be located. It was simply a grant of a right of way, and this carried with it only the right to "construct, maintain, and operate its line of railroad" on the strip of land indicated; but the appellant contends that it has the right to appropriate the right of way as a location for its turn-tables, depots, or for any other purpose necessary to the operation of its road. This may be true when the exercise of the privilege does not conflict with the rights of others. The occupants, claimants, and purchasers of lots on Benton street, however, had the right co-ordinate in time and authority to expect and demand the use and enjoyment of the street as such, subject always to the restraint laid upon it by the act itself, of permitting the company to build and operate its road
77 upon it; but an exclusive right in the company in any part of it would be inconsistent with the land-owner's privilege of user.

Benton street necessarily intersects many other streets, and if the company's position were once admitted what would prevent it from blockading any or all cross-streets at their intersection with Benton, with their depots, warehouses, turn-tables, &c., &c., and thus substantially deprive the two parts of the town of the means of intercommunication?

To the extent that the legitimate use of the street, as *as* a right of

way proper, does not prevent the use and enjoyment of it as a public highway, the adjacent property-owners and the public in general have a right to use it as such. The rights of the rail-
78 road in this respect are no greater than if the right of way had been conferred by the city, under legislative authority for that purpose, and the only authority the company has shown for maintaining the turn-table complained of is the city ordinance.

We have treated the case as though the Legislature had empowered the city to authorize the use of the street, as the company has used it, without compensation to the owner, and without reference to the fact that the embankment might have been constructed with more convenient access to the public.

At the time that the ordinance under which the appellant claimed was passed there was no legislative authority for it. After the appellee's suit was instituted the Legislature by general act ratified the action of the city, and we have been content to treat the act of the Legislature, as the appellant's counsel have done, as validating the city's action *ab initio*. The consent of the city to the use of the street, however, cannot impair the appellee's right to compensation, for, as we have seen, it is a right secured to her by the Constitution.

79 Finding no error, the judgment is affirmed.

Application for Allowance of Writ of Error.

To the Honorable S. R. Cockrill, chief justice of the supreme court of Arkansas:

Comes the Hot Springs Railroad Company, by its attorney, J. M. Moore, and complains that in the records and proceedings, and also in the rendition of a judgment in a suit between Fannie G. Williamson, plaintiff, and The Hot Springs Railroad Company, defendant, in the supreme court of Arkansas, being the highest court of law or equity in said State in which a decision could be rendered in said suit, and in which a final judgment was rendered against the defendant, who was the appellant in said proceeding, on the 2d day of January, 1886, wherein was drawn in question the construction of a statute of the United States and the decision was against the right and privilege set up under said statute, all of which appears in the record and proceedings in said suit, manifest error hath happened to the great damage of the Hot Springs Railroad Company.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. M. MOORE, *Att'y.*

Allowed:

STERLING R. COCKRILL,
Ch. Justice.

80 January 23d, 1886.

Comes the appellant, by attorney, and presents to the clerk of this court a writ of error in said cause from the Supreme Court of the

United —, filing therewith a copy of said writ, and files the following bond:

Bond.

Know all men by these presents that we, J. M. Moore and Geo. E. Dodge, are held and firmly bound unto Fannie R. Williamson in the full and just sum of three thousand dollars, to be paid to the said Fannie G. Williamson, her executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22d day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a session of the supreme court of the State of Arkansas, in a suit pending in said court between Fannie G. Williamson, plaintiff, and The Hot Springs Railroad Company, defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit and a citation, directed to the said Fannie G. Williamson, citing and admonishing her to be and appear at a
81 Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Hot Springs Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN M. MOORE. [SEAL.]
GEO. E. DODGE. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
STERLING R. COCKRILL,
Ch. Justice.

STATE OF ARKANSAS:

In the Supreme Court.

I, Luke E. Barber, clerk of the supreme court of the State of Arkansas, hereby certify that the foregoing 78 pages contain a full, true, and complete transcript of the record and proceedings in said court in the cause therein stated, except the briefs of counsel and the maps (which are the original maps).

In testimony whereof I hereto set my hand as clerk and affix the seal of said court, at my office, in Little Rock, Arkan., this 20th day of May, A. D. 1886.

[Seal of the Supreme Court of Arkansas.]

L. E. BARBER, *Clerk.*

Endorsed on cover: Arkansas supreme court. No. 366. The Hot Springs Railroad Company, plaintiff in error, *vs.* Fannie G. Williamson. Filed September 27, 1886.

FILED
NOV 11 1889

In the Supreme Court of the United States.

HOT SPRINGS RAILROAD COMPANY,
Plaintiff in Error,
v.
FANNIE G. WILLIAMSON,
Defendant in Error.

No. 93.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN M. MOORE.

PRESS PRINTING CO., LITTLE ROCK, ARK.

In the Supreme Court of the United States.

HOT SPRINGS RAILROAD COMPANY,
Plaintiff in Error,
v.
FANNIE G. WILLIAMSON,
Defendant in Error.
No. 93.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The Hot Springs Railroad Company, the plaintiff in error, was incorporated under the laws of Arkansas in the year 1875, for the purpose of constructing and operating a railroad from Malvern, in Hot Spring County, to Hot Springs, in Garland County. The road was constructed during that year from Malvern to the corporate limits of Hot Springs, where its terminal structures were located.

On the 3d day of March, 1877, Congress passed the following act in relation to the Hot Springs reservation:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That so much of Section 5 of an act of June 11, 1870, in relation to the Hot Springs reservation of Arkansas, as provides for the appointment of a receiver by the court, be, and

the same is hereby, repealed: *Provided*, That nothing in this section shall be construed to affect the right of the United States to collect and receive rents already due.

SEC. 2. That it shall be the duty of the President of the United States upon the passage of this act, to appoint three discreet, competent, and disinterested persons, who shall constitute a Board of Commissioners, any two of whom shall constitute a quorum, who are hereby authorized to perform and discharge the duties specified by this act, and for that purpose shall meet at Hot Springs, in the State of Arkansas, within thirty days after their appointment, and shall, before entering upon the discharge of their duties, subscribe to the usual oath for civil officers, and shall, at their first meeting, organize by the election of one of their number as chairman of the board, having given ten days' notice of the time and place of meeting in some daily paper published at Hot Springs, which notice shall be continued during the entire session of said Board of Commissioners, and all the evidence herein provided to be taken by said board shall be taken at Hot Springs.

SEC. 3. That it shall be the duty of said Commissioners, after examination of the topography of the reservation, to lay out into convenient squares, blocks, lots, avenues, streets and alleys, the lines of which shall correspond with the existing boundary lines of occupants of said reservation, as near as may be consistent with the interests of the United States, the following described lands, to-wit: The south half of section twenty-eight, the south half of section twenty-nine, all of sections thirty-two and thirty-three, in township two south and range nineteen west; and the north half of section four, the north half of section five, in township three south and range nineteen west, situate in the County of Garland, and State of Arkansas, and known as the Hot Springs reservation.

SEC. 4. That before making any subdivision of said lands, as described in the preceding section, it shall be the duty of said Board of Commissioners, under the direction and subject to the approval of the Secretary of the Interior, to designate a tract of land included in one boundary, sufficient in extent to include, and which shall include all the hot or warm springs situate on the lands aforesaid, to embrace, as near as may be, what is known as Hot Springs Mountain, and the same is hereby reserved from sale, and shall remain under the charge of a Superintendent, to be appointed by the Secretary of the Interior; *Provided, however*, That nothing in this section shall prevent the Secretary of the Interior from fixing a special tax on water taken from said springs, sufficient to pay for the protection and necessary improvement of the same.

SEC. 5. That it shall be the duty of said Commissioners

to show by metes and bounds on the map herein provided for, the parcels or tracts of lands claimed by reason of improvements made thereon or occopied by each and every such claimant and occupant on said reservation; to hear any and all proof offered by such claimants and occupants and the United States in respect to said lands and in respect to the improvements thereon; and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value, which shall be fixed by said Commissioners; *Provided, however*, That such claimants and occupants shall file their claims, under the provisions of this act. before said Commissioners within six calendar months after the first sitting of the said Board of Commissioners, or their claims shall be forever barred; and no claim shall be considered which has accrued since the twenty-fourth day of April, eighteen hundred and seventy-six.

SEC. 6. That the said Commissioners shall have power to compel the attendance of witnesses and the productioe of papers touching the occupancy or improvements of or on said lands, or any other matter in any wise belonging or appertaining either to the said lands or the improvements thereon; shall have power to examine under oath all witnesses that may come before them, and all testimony shall be reduced to writing, and preserved as hereinafter provided.

SEC. 7. That said Commissioners shall have power to remove, or cause to be removed, all buildings or obstructions upon the said Hot Springs reservation when the same may be necessary to carry out the provisions of this act, as also all obstructions to streets, alleys, or roads, to be laid off, straightened or widened as herein provided for.

SEC. 8. That the Commissioners shall have power to straighten or widen any of the present streets or alleys in the town of Hot Springs, and lay off such additional streets, alleys and roads in said Hot Springs reservation, or in the Town, before the sale or disposition of any of the property herein mentioned, as the convenience of the public and the interest of the United States may require, and for that purpose may condemn all buildings that they may find necessary to condemn in order to straighten or widen said streets and alleys, lay off new streets, alleys and roads, and also all buildings or improvement on the reservation herein made, and fix the value on all property thus condemned.

SEC. 9. That it shall be the duty of said Commissioners, without delay, to file in the office of the Secretary of the Interior, the map and survey herein provided for, with the boundary lines of each claim clearly marked thereon, and with each division and subdivision traced and numbered, accom-

panied by a schedule, showing the name of each claimant, and of each lot or parcel of land, the appraised value thereof, numbers to correspond with such claim upon the map; also all of the evidence taken by them respecting the claimants' possessory right of occupation to any portion of Hot Springs reservation, and their finding in each case; also their appraisal of each tract or parcel of land, and the improvements thereon; and it shall be the duty of said Commissioners to issue a certificate to each claimant, setting forth the amount of land the holder is entitled to purchase, and the valuation fixed thereon, and also showing the character and the valuation fixed upon the improvements of said tract or parcel of land, and to issue a certificate or certificates to all persons whose improvements are condemned as herein provided, showing the value of said improvements.

SEC. 10. That it shall be the duty of the Secretary of the Interior, within thirty days after said Commissioners file said report and map in his office, to instruct the United States Land Officers of Little Rock (Arkansas) land district to allow said lands to be entered as hereinafter provided, and to cause a patent to issue therefor; and it shall be the duty of the Land Officers authorized to sell said lands to give twenty days' public notice in the Little Rock and Hot Springs newspapers that said lands are subject to entry in accordance with the provisions of this act.

SEC. 11. That any claimant or occupant, his heirs or legal representatives, in whose favor said Commissioners have adjudicated, shall, nnder such rules and regulations as the Secretary of the Interior may prescribe, have the sole right to enter and pay for, at the price fixed by said Commissioners, the amount of land the Commissioners had adjudged that they were entitled to purchase, at any time within twelve months next after the Land Officers give the public notice herein required.

SEC. 12. That upon the failure of any claimant or occupant, in whose favor the Commissioners have adjudged, to pay the valuation fixed upon said lands within the time and in the manner herein prescribed, then said lands, together with all other lands that no one has an adjudicated right to purchase under this act, shall be sold by the direction of the Secretary of the Interior, to the highest bidder, at public sale, for not less than the appraised value thereof, at the Land Office at Little Rock, after notice of such sale has been advertised three months in some newspaper, in the Town of Hot Springs, and in such other papers as he may designate, said lands and improvements to be sold together; and the proceeds arising from the sale thereof shall be paid to the Receiver of Public Moneys at the Land Office in Little Rock, Arkansas.

SEC. 13. That any claimant or occupant who does not desire to purchase the lands adjudicated to him or her, at the valuation fixed by said Commissioners, shall have the right to remove any improvements made on said land, at his or her own cost, before the time fixed for the payment for said lands.

SEC. 14. That the money arising from the sale of the lands shall be paid into the treasury in the same manner as other moneys arising from the sale of public lands, and held for the purposes herein specified, and at the further disposal of Congress; and the money arising from water rents shall be under the control of the Secretary of the Interior, and expended by him for the purposes hereinbefore stated, an account of which shall be annually rendered to Congress, showing the amount received, the amount expended, and the amount remaining on hand at the end of each fiscal year.

SEC. 15. That the United States Marshal for the Judicial District of Arkansas, in which the Hot Springs may be situated, shall execute all processes required to be executed by this act.

SEC. 16. That said Commissioners shall hold their offices for the period of one year from the date of appointment, and shall have power to employ competent engineers to make the maps and surveys herein provided for, at a reasonable compensation; to employ a stenographer, who shall also act as clerk, at a compensation of not more than eight dollars per day; to rent an office, and purchase the necessary stationery; and the compensation of said Commissioners shall be ten dollars per day, each, all of which shall be paid by the Secretary of the Interior, upon the certified vouchers of said Commissioners.

SEC. 17. That the right-of-way be, and the same is hereby, granted to the Hot Springs Railroad Company, a company duly incorporated and organized under the laws of the State of Arkansas, to construct, maintain and operate its line of railroad upon, over and across the Hot Springs reservation in the State of Arkansas, as follows:

Commencing on the east line of the south half of section thirty-three, in township two south of the base line, in range nineteen west of the fifth principal meridian, in the county of Garland, and State of Arkansas, at a point about six hundred feet from the southeast corner of said section; thence running up a ravine parallel to and south of the Benton wagon-road, westwardly through said section, to a point where the same will intersect with the Malvern stage road at a point south of the grave-yard on said reservation.

SEC. 18. The right-of-way hereby granted shall consist of a strip of land fifty feet wide on each side of said railroad,

measured from the centre line thereof, from the point on the east line of said section of land where said railroad enters the same to the terminus of the track of said road; *Provided*, That said railway company may purchase upon the same terms as individuals land for shops, depots, and other purposes, not exceeding twenty acres; *Provided, however*, That Congress may at any time alter, amend, or repeal this section.

SEC. 19. That a suitable tract of land, not exceeding five acres shall be laid off by said Commissioners, and the same is hereby granted to the County of Garland, in the State of Arkansas, as a site for the public building of said county; *Provided*, That the tract of land hereby granted shall not be taken from the land reserved herein for the use of the United States.

19 Statutes at Large, 377.

After the passage of said act the road was extended under its provisions within the city limits to the point designated in the latter part of section seventeen—the old Malvern stage road.

In laying off streets and alleys the Commissioners appointed under the provisions of the act located Malvern avenue, which runs nearly at right angles with the course of the railroad, a distance of one hundred and thirty feet west of the old Malvern stage road, the western terminus of the right-of-way as described and granted in said act, and the City Council of Hot Springs on the 8th day of December, 1880, passed an ordinance granting the railroad company a right-of-way fifty feet wide from the western terminus to Malvern avenue. (Ordinance, p. 7.)

Benton street, as laid off by the Hot Springs Commissioners, extends from Malvern avenue in an easterly direction to the original depot of the railroad company, and the right-of-way is adjacent to it, as is shown on the official map of the survey printed with the record.

Mrs. Fannie G. Williamson, the defendant in error, owned lots one and two in block seventy-eight in the City of Hot Springs, situated on the north side of Benton street, at its junction with Malvern avenue and Valley street, and lot nine in block sixty-nine on the opposite side of Benton street.

She filed her complaint against the railroad company in the Garland Circuit Court on the 10th day of October, 1882, in which she alleged that the defendant constructed, as an extension of its road, a permanent embankment fifty feet in width along the center of the street between lots one and nine aforesaid and running the full length thereof; and also constructed, at the southeast corner of the embankment, and the northeast corner of lot nine, a turn-table, and laid its tracks along and upon said embankment and turn-table. That said structures cut off access from the streets to said lots, impaired their value, etc. (Complaint, p. 3.)

The embankment complained of was constructed upon the right-of-way granted to the railroad company by the City Council, under the ordinance referred to.

The turn-table was constructed partly upon the right-of-way granted to the company by the act of Congress of March 3, 1877, and in part on lots ten and eleven in block sixty-nine, which belonged to the railroad company. It is situated about forty yards east of the west end of the congressional grant and about the same distance east of the plaintiff's lots. (Testimony of George M. French, p. 14.)

Defendant answered, as to the turn-table, that it was constructed upon the right-of-way granted it by the act of Congress and upon lots ten and eleven in block sixty-nine, which was the property of the defendant. (Answer, p. 5.)

The following agreed statement of facts was filed and read at the trial:

The following facts are agreed on in said cause:

1st. The accompanying map shows the location of Malvern avenue, Benton street, the plaintiff's lots, and of the right-of-way granted by Congress to the defendant under the act referred to in defendant's answer, and approved by the Hot Springs Commission and the Secretary of the Interior.

2d. The extension claimed by the defendant under the ordinance of the City of Hot Springs, consists of a strip fifty feet wide, the center thereof on a direct line with the center of the right-of-way granted by Congress and extending westward to Malvern avenue, a distance of 130 feet

3d. The turn-table is fifty feet in diamater; it is located as marked on the map. Lots 10 and 11, in block 69, upon which a part of the turn-table is located, belong to the defendant.

4th. Gaines avenue was located as a street of said City of Hot Springs, and opened and accepted by the city in 1876, October or September; it was eighty feet wide, and the northern boundary thereof was about co-terminus with the northern boundary of defendant's right-of-way. The-right-of way is one hundred feet wide, subject to explanation. (P. 6.)

It will be observed that Benton street, which is adjacent to the right-of-way, and forty feet in width as appears from the map, lies immediately north of and directly adjacent to Gaines avenue, the old street referred to in the fourth clause of the agreed statement.

George M. French testified as follows:

"The turn-table is situated in part on the right-of-way granted by Congress to defendants and in part on lots 10 and 11 in block 69. It is about forty feet east of the west end of the right-of-way granted by Congress, and about the same distance east of plaintiff's lots. The depot-house, the tracks, and turn-table, which are located on the right-of-way, are such as are used at terminal stations, and they are all required in the usual and necessary operations of a railroad. Without the turn-table the train could not be run on the right-of-way within the City of Hot Springs without great danger to life and property, for without it the engines could not be turned, and would have to be run in back motion either in departing from the depot or coming to it. This would be especially dangerous at night, as the head-light could not be seen while the engine was in back motion. The depot, turn-table, and embankment, were constructed about two years ago, and are all constantly used for railroad purposes. I am a civil engineer and do work of that character for the defendant." (P. 14.)

The railroad company asked the following direction to the jury, which was refused:

2. The right-of-way was granted by Congress to the defendant from a point on the eastern boundary of the Hot Springs reservation, to the old Malvern stage road within said reservation. The grant carried with it the right to erect and maintain all suitable structures usual and necessary to the operation of a railroad, including a depot, station-house, and such tracks and other improvements of that nature as are

necessary to the proper and convenient dispatch of its business; and if you find that the turn-table and other improvements complained of, or any part of them, are within the right of-way granted by Congress to the defendant, as aforesaid, and are necessary to the operation of its road, and such as are usual at terminal stations, you cannot find for the plaintiffs by reason of any damage caused to their lots by such improvements. (P. 18.)

Exceptions were properly saved to the refusal of the court to instruct the jury as requested, and an appeal was prayed to the Supreme Court of the State, where the ruling of the trial court, in refusing said instruction, was sustained.

ASSIGNMENT OF ERRORS.

The court erred in ruling that the plaintiff (in error) did not have the lawful right to construct its works, including the turn-table, on the right-of-way granted it by the act of Congress of March 3, 1877, and in holding that it was liable to the defendant (in error) by reason of the alleged obstruction caused by said works.

ARGUMENT.

The only question before this court is that which arises under the act of Congress, copied in the foregoing statement of facts, and relates alone to the turn-table and works constructed on that part of the right-of-way embraced in the grant by Congress. This excludes from consideration the embankment built upon the western extension of the track, under the city ordinance, and involves the proper construction of the act of Congress.

It was held by the State courts that the Commissioners appointed under that act had no power to vacate or abandon any street existing at the date of the passage of the act; that the grant of the right-of-way to the railroad company did not invest it with an absolute title in fee but only carried with it the right to construct, maintain and operate its line of road upon and over the strip of ground one hundred feet wide, which might be definitely fixed and located as the right-of-way under the description contained in Section 18 of the act; and that the same having been located, in part, within the limits of Gaines avenue, one of the original streets, it thereby became subject to the public servitude, and constituted a part of Benton street.

Is this a correct interpretation of the act?

1. The line of the right of way is definitely fixed and described in Section 17; nothing further was required for its ascertainment. The commissioners were charged with no duty in regard to it. They had no power by any act of theirs either to enlarge or to impair the grant. It was a grant *in praesenti*, vesting the title at once in the railroad company, according to the grant. It required no action on the part of any public official, not even a survey by official authority, for the purpose of identifying the strip of land described.

Any surveyor could locate the line according to the description contained in the grant.

Glasgow v. Hortiz, 1 Black., 595.

Schulenberg v. Horriman, 21 Wall., 60.

The right-of-way was located and the road constructed on

the route described, and the location approved by the Commissioners and by the Secretary of the Interior.

See agreed statement, *ante*.

The object of the grant was to enable the company to extend its road and to establish its depot within the corporate limits of the city for the convenience of the inhabitants and the public generally, and it carried with it the authority to do all that was necessary to accomplish that object.

Pierce on Railroads (2nd Ed.), 132.

"The interest of a railroad company in its location, although "technically an easement, is not limited to an ordinary right-"of-way, such as is acquired for highways, but it justifies a "use of the land for all the purposes of a railroad." The company may erect thereon, except at crossings, all such structures as are necessary to the maintenance and operation of the road.

Ibid, 159, 160.

Atlantic Tel. Co. v. R. R. Co., 6 Bissell, 158.

Jackson v. Rutland, 25 Vt., 159.

R. R. Co. v. Richardson, 91 U. S., 468.

Lewis on Em. Domain, Secs. 584 and 586.

The works which were erected on the right-of-way granted to the company by the act of Congress, were such as are usual at terminal stations. They were necessary to the safe and convenient operation of the road within the city, and were properly and skilfully constructed.

See the evidence of French, *ante*.

The Commissioners had no power to lay off a street on the right-of-way, nor did they attempt to do so. An examination of the map, which is the only record of their proceedings, shows that Benton street is located adjacent to and parallel with the right-of-way, and that it does not include it. The width of the street is marked on the map as forty feet between the open space at the junction of Benton, Malvern and Valley streets, and Laurel, a cross street, and sixty feet, west of the latter street, and diverges from the right-of-way near Palm, another cross street. The width of the right-of-way is also plainly marked with a line running through the center of it, and a line is also drawn between the right-of-way and Benton street, separating them, as in the case of the streets and blocks. Unless these marks and indications on the map are to be ignored as meaningless and without significance, they must be taken to have been intended to distinguish between the street and the right-of-way. No other meaning or significance can be attached to them.

The grant to the company was absolute, and unqualified by any power that was vested in the Commissioners. The title had vested in the company before the Commissioners entered upon the discharge of their duties. They could not appropriate the strip of land granted to the railroad for a right-of-way to the purposes of a public street, or subject it to a public servitude.

Where a right-of-way has been acquired by a railroad company in a city or town, the city council cannot lay out or open a street longitudinally along the right-of-way; nor can they open a street through depot grounds occupied by a railroad and needed for railroad purposes.

N. J., S. R. R. Co. v. Long Br. Comm., 39, N. J., 28.

City of Bridgeport v. N. Y. & N. H. R. R. Co., 36 Ct., 255.

St. Paul U. D. Co. v. St. Paul, 30 Minn,. 359.

It is held that streets may be laid out *across* the tracks of a railroad, and we concede that the Commissioners had that power whenever it became necessary to locate a street across the right-of-way. We submit, however, that the distinctiou strengthens our position as to their want of power to appropriate the right-of-way for its entire length; indeed, to hold otherwise would clothe the Commissioners with the power to defeat the objects of the grant to the company.

The question as here presented is free from any complications growing out of the rights of abutting proprietors; such as usually arise in similar cases. Congress had the absolute disposal of the lands within the reservation. There were no vested private rights that could interfere with its policy in making the grant to the company, and hence the language used in the granting clause of the act should be interpreted to convey such an interest, and such rights of use and occupancy as are ordinarily implied by the terms employed.

2. It is a conceded fact that the right-of-way is located on one of the original streets of the old Town of Hot Springs.

Is the grant to the defendant impaired, or its right to the control, use and enjoyment of its right-of-way, to the exclusion of the public, diminished by that fact?

It was held by the State courts that Section 8, of the act of Congress, prohibited the discontinuance of existing

streets, and that the location of the right-of-way in the line of the old street operated as a limitation and qualification upon the defendant's right under the 17th section; that the right-of-way vested in the defendant was subject to the public servitude of a street, and could not be used by the defendant to the exclusion of the public. Granting the policy of the act as to existing streets to be as contended by the plaintiff and held by the court, there is nothing in its provisions that manifests an intention that the rights granted to the defendant were to be subordinated to that policy. The 17th section contains no reservation or qualification; it fixes with certainty the line of the right-of-way, and upon which it was located. If such had been the intention of Congress it would not, I submit, have left it to implication, but would have expressed its meaning in plain terms.

The case of *Railroad Co. v. Baldwin, 103 U. S., 428*, involved a point very similar to the one under consideartion. Congress passed an act granting lands to the State of Kansas, for the benefit of the St. Joseph and Denver City Railroad company, subject to the condition contained in the first section:

"That if at the time the line of the road was definitely fixed, "the United States had sold any section or part thereof, or "the right of pre-emption or homestead settlement had at- "tached to it, or the same had been otherwise reserved by the "United States for any purpose, the Secretary of the Interior "should select an equal quantity of other lands, etc., which "should be held by the State for the same purpose."

The fourth section provided that the lands should be with-

drawn from market when the company should file with the Secretary of the Interior maps of its line, designating its route, etc.

The sixth section granted to the railroad company the right-of-way through the public lands, without any reservation or exception. The land in controversy was entered after the passage of the act, and before the survey and location of the route of the road or the withdrawal of the land from market. The purchaser sued the railroad company for damages for entering upon the land and appropriating a right of way. He contended that the first section was a limitation upon the grant of the right of way in the sixth section, as it is contended that the eighth section of the act in relation to the Hot Springs reservation is a limitation and qualification of the seventeenth section. The court, by Mr. Justice Field, say :

" But the grant of the right-of-way by the sixth section " contains no reservations or exceptions. It is a present, abso- " lute grant, subject to no conditions except those necessarily " implied, such as that the road shall be constructed and used " for the purposes designated."

I submit that the case is conclusive of the question now before the court. The policy of the government to continue the lands in the market and to vest in those who might acquire rights by purchase, pre-emption or homestead settlement, the exclusive right and title to the lands, is much more clearly expressed than is the intention to preserve the old streets and ways of the Town of Hot Springs by the eighth section of the act before the court, or to subordinate the rights granted to the defendant to the right of the public.

But is it true that the eighth section of the act prohibits the discontinuance or abandonment of old streets? It clearly does not do so expressly; does it by implication?

The 3d section of the act of Congress provides that the Commissioners shall lay out that part of the reservation described in the section into "convenient squares, blocks, lots, "streets and alleys, the lines of which shall correspond with "the existing boundary lines of *occupants of said reservation* "as near as may be consistent with the interest of the United "States." The 8th section provides that "the Commissioners "shall have power to straighten or widen any of the present "streets or alleys in the town of Hot Springs; and to lay off "such additional streets, alleys and roads in said Hot Springs "reservation, or in the town * * * as the convenience of "the public and the interest of the United States may require; "and for that purpose may condemn all buildings they may find "necessary to condemn in order to straighten or widen said "streets and alleys. or to lay off new streets, alleys and roads." * * * These are the provisions most material to the question. The court, looking to the 8th section of the act for the power of the Commissioners in the matter of laying off streets, alleys, etc., assumed that the power to straighten or widen existing streets therein conferred, was inconsistent with the power to discontinue or abolish them. I submit that this was a misconstruction of the act. The 3d section describes the manner in which the reservation is to be laid off. No reference is made in this section to existing streets, or to the existing survey of the town. The Commissioners were, by its provisions, to proceed *de novo*. They were to examine the TOPOGRAPHY OF THE RESERVATION before they proceeded to lay out the town. For

what purpose were they to do this, unless they were to lay off the town, including streets and alleys, with reference to the topography rather than the old survey? This section provides also, that the lines of the survey shall correspond with the existing boundary lines, not of streets and alleys, but of OCCUPANTS OF THE RESERVATION, as near as may be consistent with the interest of the United States. Why was all reference to the original streets omitted here, if it was the intention that the Commissioners should retain them? This section precribes more fully than any other the manner in which the town was to be laid out, and yet there is no reference, expressly or impliedly, to the original streets. In order to understand and correctly interpret the 8th sectiou, it is necessary to read in conection with the 6th and 7th sections. The sections preceding the 6th section prescribe the duties of the Commissioners *in the matter of laying off the town*, fixing the boundaries of the permanent reservation, taking evidence and adjudicating the rights of claimants, and other matters not necessary to mention; and the object of the 6th, 7th and 8th sections was, not again to define the duties of the Commissioners, but to clothe them with the power to perform the duties imposed by the preceding sections. Section 6 empowers them to compel the attendance of witnesses and the production of papers; Section 7 empowers them to remove all obstructions from the reservation provided for in the 4th section, and also from streets, alleys or roads to be laid off, straightened or widened; the 8th section confers upon them the power to straighten or widen present streets or alleys, and to open additional streets, etc., before the sale or disposition of any of the property mentioned in the act, and to condemn and fix the value of all buildings necessary to be

condemned in order to carry out the above purpose, or in the establishment of the permanent reservation, embracing the hot waters.

It was contemplated that in widening and straightening old streets and opening new ones, as well as in establishing the permanent reservation, it would be necessary for the Commissioners to remove buildings erected by settlers on the lands; hence the necessity for investing them with the power of condemnation and removal. This purpose is plainly expressed in the section under consideration.

It is in this sense that Section 8 must be construed, and not as a qualification of the duties prescribed by the third section. In construing these provisions, it must be borne in mind that Congress was legislating with reference to a new state of affairs; with the advent of the Commissioners a new regime was to begin. The old conditions were to pass away before the new order of things to be introduced by them. And among other changes, the survey and platting of the town was provided for. It is from this standpoint that the act is to be construed; and hence it was deemed necessary to empower the Commissioners to straighten or widen—that is, to retain and utilize—existing streets and alleys, as well as to open new and additional ones, and to do all that might be necessary to be done in the accomplishment of, that object.

JOHN M. MOORE,
For the Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

NO. 366.

THE HOT SPRINGS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

FANNIE G. WILLIAMSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

Brief for Fannie G. Williamson.

R. G. DAVIES, Attorney.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE HOT SPRINGS RAILROAD,
Plaintiff in error,
vs.
FANNIE G. WILLIAMSON.

Brief for Fannie G. Williamson.

The questions involved in this case, and to which the court's attention is requested, are:

1. Whether the matter in dispute involves the con-

struction of the Act of Congress of March 3, 1877, granting a right of way across the Hot Springs Reservation in Arkansas to the Hot Springs Railroad. It is submitted that said question is not necessarily a matter of enquiry.

2. If the court should hold that the above question is involved, then did the Circuit Court of Arkansas err in permitting the witness Williamson to testify in behalf of his wife, and then excluding his evidence, and instructing the jury to disregard it, after all the evidence was in, and counsel had been directed to address the jury? This is not a Federal Question, and the decision of the Arkansas Supreme Court is final.

3. Did the court err in giving and refusing the following instructions?

INSTRUCTION GIVEN AT THE REQUEST OF WILLIAMSON.

1. The court instructs the jury that the right to use streets of a city by the adjoining lot owners, is property, and a right of way belonging to the owners of said lots; and that no such right can be taken, or injured or appropriated to the use of any corporation, until full compensation therefor shall be first made to the owner in money, which compensation is irrespective of any benefit from any improvement made by said corporation.

Louisville, and Big Sandy Railroad vs. Combs, 19 American Reps. 67.

Const. of Ark., Art. 12, Sec. 9; Do Art 2, Sec. 22.

Second Dillon, page 620. sec. 625 note.

2. The City of Hot Springs had no right to grant a right of way along Benton street, and defendant could acquire no right to build any permanent structure or lay its track thereon, by virtue of such ordinance.

Const. 1874, Art. 2, Sec. 23, Acts 1874, page 9, Sec. 14.

Angell on Highways, Sec. 33 and 34.

3. The court instructs the jury that the measure of damages to adjacent property, caused by the use of a street as a site for a railroad, is the diminuition of the value of the property, and the recovery may include prospective as well as past damages when the obstructions to the use of the street are of a permanent nature.

The court on its own motion gave the following: [See Record, page 17.]

That if they believe from the evidence that the defendant, by its agent or employes, constructed in Benton street, between lot 9 in block 69, and lots 1 and 2 in block 78, in the city of Hot Springs, a permanent embankment as a road-bed on which to lay and extend its railroad track, and then, on or before the commencement of this suit, placed and fixed its track permanently upon said embankment, as charged in said complaint, that said lots, or any part of them, were or are permanently injured or damaged thereby, and that said lots were then, and still are, the property of the plaintiff, Fannie G. Williamson, the jury must find in her favor; and, in such case, the difference between the present value of the lot or lots so damaged with the embankment and the said track thereon existing, and what such values would be if the embankment and track were re-

moved, or had never existed, is the measure of damages.

St. Louis, Arkansas & Texas R. R. vs. Anderson, 39 Arkansas, 167.

The defendant asked the following instructions, all of which were refused:

1. The plaintiffs allege that the defendant has unlawfully obstructed Benton street by the construction of the embankment and turntable complained of and the occupancy of said street by its road bed and improvements, to the injury of plaintiffs and other owners of lots adjoining said street, and seek to recover damages by reason of the alleged injury to the lots. If the allegations of the complaint are true the obstructions complained of create a public nuisance and the injury alleged being common to all owners of lots adjacent to said street, the plaintiff cannot maintain a private action therefor, and you will therefore find a verdict for defendant.

2. The right of way was granted by Congress to the defendant from a point on the eastern boundary of the Hot Springs reservation to the old Malvern stage road within said reservation; the grant carried with it the right to erect and maintain all suitable structures usual and necessary to the operation of a railroad, including a depot, station house and such tracks and other improvements of that nature as are necessary to the proper and convenient dispatch of its business. And if you find that the turn-table and other improvements complained of, or any part of them, are within the right of way granted by Congress to the defendant as aforesaid, and are necessary to the operation of its road, and such as are usual at terminal stations, you cannot find for the

plaintiff by reason of any damage caused to their lots by such improvements.

3. The streets and alleys were ceded by Congress to the city of Hot Springs for the use of the public, and if the city with the sanction of the Legislature, grants the railroad company the right to construct and operate its road thereon, such company will not be liable to an abutting lot owner for consequential damage, unless it results from the negligent and improper construction of the road. It is not alleged in this case that the defendant's road is negligently and improperly constructed. Therefore, if you find that the city of Hot Springs by one or more ordinances adopted prior to the first day of March, 1883, granted defendant the right of way upon Benton street between plaintiff's lots, and that the embankment and other structures complained of, or any of them, are located thereon, you will not find for the plaintiffs by reason of any damage caused to their lots by said embankment and such improvements.

Defendants fourth, fifth and sixth instructions are omitted, as no point is made on them, besides the court gave an instruction of its own (Record page 17), which was not objected to, and which correctly states the rule (supra.)

April 20th, 1832, Congress passed an act providing "That the Hot Springs in the said Territory, (Arkansas), together with four sections of land including said Springs, as near the center thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located or appropriated, for any other purpose whatever."

Early in the present century the medicinal qualities of

these springs were discovered, and from that fact the adjacent land had an exceptional value.

Though not easily accessible, and in a district of country claimed by Indians, until after the treaty made with the Quapaws in 1818, they were considerably frequented by invalids and others, as early as 1810. Cabins were erected long before the public surveys were extended to this section of country, and William H. Gaines, and wife, and others representing the heirs of Ludovicus Belding, claimed the quarter section upon which the land in controversy is situated, by virtue of a residence and cultivation in 1829. The plaintiff's ancestor, William H. Gaines, as the co-owner and agent of the claim of the Belding heirs, gave the premises in controversy to the plaintiff, his daughter, Fannie G. Williamson. The residence, and cultivation and improvement of the property continued in these persons up to, and including the trial at bar, from the year 1829. Various streets and roads had been laid out, as the village grew into a city of some five thousand inhabitants, and among them was Gaines Avenue, running *east*, from the *east* side of the Malvern stage road opposite the property of the plaintiff, 80 feet wide. A street railroad was built upon it and it was used and accepted as a street and public highway of the city in October or September 1876. This street was laid out and opened by William H. Gaines through his claim. In March A. D., 1877, Congress, after a protracted litigation for half a century, in which the Hot Springs reservation became famous in the history of land titles of the United States, and after a decision against all the claimants was rendered by this court, and in favor of the government of the United States, passed an act for the relief of these persons. This court in rejecting this claim of Gaines and

the Belding heirs, observed that whatever hardship might thereby ensue, would, no doubt, be taken into consideration by the legislative department in the future disposition of the lands. "Accordingly," says the opinion in the case of Rector vs. Gibbon, 111, U. S., 276, "Accordingly, and it is believed, upon this suggestion, Congress passed the act of March 3, 1877." This act provided that all those who had occupied and improved their possessions, prior to the 24th day of April, A. D., 1876, should have a pre-emption right to the land claimed by them. For more than half a century the reservation had been occupied and claimed by individuals of whom Gaines was one, believing that the government had parted with its title to them. A prosperous town had grown up upon the land with all the incidents of business and social interest. Congress undertook, by this act, to mitigate the hardships which would follow the strict enforcement of the government's legal rights. The pre-emption right accrued prior to the 24th of April 1876, the date of the first decision in favor of the government. The act recognized the existence and location of the City of Hot Springs, of its streets and alleys, and thoroughfares, and it empowered the commissioners, whose office was created by the act, to lay off and open such additional streets, and to straighten and widen (not close), existing streets, as the public convenience and the interest of the government might require. The same act granted a right of way to the Hot Springs Railroad in the following language:

"Section 17. That the right of way be, and the same is hereby granted to the Hot Springs Railroad Company, a company duly incorporated and organized under the laws of the State of Arkansas, to construct, maintain, and operate

its line of railroad, upon, over and across the Hot Springs Reservation, in the State of Arkansas, as follows: Commencing on the east line of section 33, in township 2, south of the base line, in range 19, west of the principle meridian, in the County of Garland, and State of Arkansas, at a point *about* six hundred feet from the southeast corner of said section, thence *running up a ravine parallel* to, and south of the *Benton wagon road westwardly* through said section, to a point where the same will intersect with the Malvern stage road at *a point south of the graveyard on said reservation.*"

"Section 18. The right of way hereby granted shall consist of a strip of land fifty feet wide on each side of the said railroad, measured from the center lines thereof, from the point on the east line of said section of land where said railroad enters the same, to the terminus of the track of said road; *Provided, that said railway company may purchase upon the same terms as individuals land for shops, depots and other purposes, not exceeding twenty acres; Provided, however, that Congress may, at any time, alter, amend or repeal this section.*"

The point of commencement is uncertain; the point of terminus laterally is still more uncertain, but the point of terminus westwardly is certain, that is, at the point of intersection with the Malvern stage road. The railroad is notified that the grant of the right of way is not to be considered as giving it land for depots, shops and other purposes, and a right is reserved to repeal the grant of the right of way at any time. Thisdoes not look like a grant of a fee simple title to any land to the railroad company, and is a very uncertain and indefinite grant of anything.

June 16th, 1880, Congress passed another act. [Statutes at large, Vol. 21, p. 288, Section 6.]

"Section 6. That the streets, courts, alleys, and other thoroughfares of the town of Hot Springs, as surveyed, opened, or established by the commissioners and represented on the map of said town, and not included in the permanent reservation, be, and the same are hereby ceded to the corporation of the town of Hot Springs for public use; *Provided, however, That nothing in this act shall be so construed, as to impair the rights or equities conferred upon claimants, by an act of Congress, approved March 3d, 1877, and an act approved Dec. 16th, 1878, in relation to the Hot Springs Reservation in the State of Arkansas.*"

This seems to convey the idea that the cession of the control of the highways, should not be construed to in any manner effect the rights or equities of those who owned abutting lots, and one of these rights was, as is stated in 2d Smith's Leading Cases, Dovaston vs. Paine, p. 228, citing the language of Swift, J., in Peck vs. Smith, 1 Conn., 103, 132, as follows:

"A highway is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, nor give the public the legal possession of it; the right of freehold is not touched by establishing a highway, but continues in the original owner of the land, in the same manner as it was before the highway was established, subject to the easement."

The original owner, the government, sold "lots one and two, in block 78, and lot numbered nine, in block 69, of the Hot Springs Reservation, by a patent to plaintiff. No other description is given, [See record p. 7.] but the commissioners had previously laid out the lots and blocks and extended Gaines avenue west through the center of claim No. 225, the property in controversy, making two corners at the intersection with Malvern Avenue, thus taking all the surface of the street so opened from Mrs. Williamson's claim, and exhibiting a map and selling by it. [See maps.] The patents related back to the time prior to the 24th day of April, A. D., 1876. The fact that a street dedicated to the public use is in an incorporated town, or that the street was laid out by the corporation makes no difference, as to the ownership of the soil, the title remains in the owner.

Philadelphia & Trenton Railroad Company, 6 Wharton 25.

City of Louisville vs. Bank of the U. S. 3 B., Monroe 138, 158.

Whatever control the corporation may have, is by virtue of its corporate character consistent with the purpose for which the street was dedicated. In this instance "*for public use.*" The effect of the sale of land bounded by a highway and described by lots and blocks certainly raises a strong presumption of a conveyance to the center of the street, and it will so pass, the authorities all hold, unless it is clearly excluded. The object of the purchaser is to enjoy the usual benefits of the streets. The understanding always is, that houses can be erected fronting on the street, with windows and doors, door steps, vaults, and even cellars extending in many cases clear across the streets from one property to

another. If the right of property in streets might under any circumstances be exercised by the grantor after having sold the lots, he might deprive his grantee of the means of entry or exit from his house, and all the enjoyments of light and air, indeed of any benefit from his purchase. Shade trees, awnings, posts, and many other convenient and useful structures might be prohibited by the original grantor, if his right to the streets remained after parting with his title to the lots. A long strip of ground 140 feet wide, and perhaps several miles in length in a large city with no means of crossing and no access to it except at each end, may be a desirable acquisition to a railroad company, but it was never in the contemplation of the United States Government as remaining in it, or the railroad. Influenced by these considerations, the law has carried out the real intentions of the parties, by holding that the title passed to the center of the street, subject to the right of passage. Where the street is called for as a boundary, it is regarded as a single line. The thread of the road is the monument of abuttal:

26 Penn., State 224.

See also Newhall vs. 8 Cushing, 598.

Champlin vs. Pendleton, 13 Connecticut 23.

But the act of Congress was particularly careful to reserve all the rights of the grantees, when it "ceded" the streets.

On or about the tenth of December, A. D., 1881, the Hot Springs Railroad having by some means had a line surveyed, and determined it would occupy it along the south side of old Gaines avenue to a point 200 feet from the terminus finally added by the city, and said survey having

been made by Clark, the engineer of the Hot Springs commission, (See evidence of French, page 15 Record) and the commission having widened Gaines avenue, to 140 feet, perhaps twenty feet on the south side and forty on the north, and having procured an additional grant of 130 feet from the city council of a right of way west of the right granted by Congress, commenced to erect and did erect along the center of the street immediately between lots 1 and 2 in block 78, and lot 9 in block 69, and running the full length thereof, an embankment of earth and stone of the breadth of fifty feet, of great height, laid six tracks thereon, and also constructed a turn table at the southeast corner of the embankment. By the said embankment and turning table the plaintiffs were cut off from egress and ingress to the property, and deprived of the use of the street, and the railroad company appropriated nearly all of Benton street, formerly Gaines avenue, to its use as a road bed and other purposes. These facts and the further fact of damage to the amount of $5,000 are alleged in a complaint, filed by the plaintiff, Fannie G. Williamson, on the tenth day of October, 1882.

The defendant answered October 30, 1883, denying none of the allegations of the complaint. The fact of the obstruction to ingress and egress, the blockading of the street, and every other allegation of the complaint is admitted, and the single allegation that the railroad is constructed upon a right of way granted by the act of congress and the ordinance of the city is interposed as a defense. [Record page 5.]

The complaint is sworn to and the answer is not.

Section 4,608, Gantt's Digest Statutes of Arkansas,

p. 816, provides:

"Every material allegation of the complaint not specifically controverted by the answer must, for the purposes of the action, be taken as true. Allegations of value and damage are not to be considered as true, by a failure to controvert them."

The fifth subdivision of Section 4,943 of Gantt's Digest of the Laws of Arkansas, page 872, provides that the railroads shall have power "To construct their road upon or across any stream of water, water course, road, highway, railroad or canal, which the route of said road shall intersect; but the corporation shall restore the road or highway thus intersected to its former state, or in a sufficient manner not to have impaired its usefulness."

The expressions of witnesses as to this or that being in the congressional right of way, means as located. The grant fixes the western end itself.

Supposing it worth the court's while to examine the answer of the defendant to see what is denied and what issues are raised by it; it is certainly demurable. The first paragraph (Record page 5) alleges a want of knowledge of the ownership of the lots. That they are located on Malvern avenue. The next is that "Defendant says its railroad is constructed upon the right of way granted by act of congress and the ordinance of the city of Hot Springs, Denies that the ordinance was passed clandestinely. Says the turn table is on congressional right of way and lots 10 and 11 in block 99. This is all.

The allegation of the complaint of the construction of the embankment of great height; that the embankment

and turn table cut off the egress and ingress and deprived plaintiff of the use of the street in connection with the lots and that their egress and ingress was destroyed; that the plaintiff was damaged $5,000, and that defendant had appropriated almost the whole of said street to its road bed and other purposes, wantonly injuring plaintiff, are admitted. None of these allegations are denied.

Subject to explanation, there was an agreed statement of facts filed. [Page 6, Record.] There was a trial and verdict for plaintiff for $2,275, and the defendant moved for a new trial on the grounds

1. That the court erred in granting the instructions asked by the plaintiff.

2. It erred in refusing the instructions asked by defendant.

3. It erred in permitting the plaintiff C. S. Williamson, to testify against the defendant's objection.

4. The verdict is contrary to law and evidence and is excessive.

The verdict was certainly warranted under the instructions of the court, and was sustained by the evidence, and not excessive.

The first proposition above referred to is that the decision of this case does not involve the construction of the act of congress. The reason why this is so, is, that congress only granted the right of way "to the Malvern stage road." The land claimed to be damaged is shown by the evidence of William H. Gaines (Record p. 11 and Map p. 25, Claim 225) to have been on the west side of the old Malvern

stage road. Certainly the width of the stage road intervened, and it fronted 300 feet on the west side of that road. The right of way approached from the east to the east side where it terminated. The right of way granted by congress could by no possibility come across the road. How the railroad got so far west, as it appears to be, on the map page 24 of the Record, we are at a loss to conjecture. Clark, the engineer of the commission, French says (p. 15 Record) surveyed a line, and this is the black line south of old Gaines avenue, AND THE WESTERN TERMINUS OF THE PRESENT RIGHT OF WAY IS 200 FEET WEST OF SAID RIGHT OF WAY SO SURVEYED; AT THE WESTERN END OF THE EMBANKMENT. "Witness was here shown map of the Hot Springs commission (page 25, Record) and stated that the black line south of the street line of old Gaines avenue, was the line of the right of way, as surveyed by Clark, the engineer of the Hot Springs commission, and the western terminus of said right of way, so surveyed, is 200 feet east of the western terminus of the present right of way at the western end of the embankment."

The city's grant of a right of way was 130 feet, west from the termination of the congressional right of way, but the termination of the congressional right of way, as surveyed by Clark, was 200 feet east of the end of the embankment, which is co-terminus with the 130 feet. [See evidence of William H. Gaines.] The turn table is forty feet east of lot 9. Lot 9 is 105 feet deep. The south side of the embankment was less than 100 feet in length so French says. [Record P. 14.] Hence adding 105 north side of lot 9 to forty feet for distance to turn table from lot 9, and 50 feet for width of turn table, we have the turn

table entirely off the congressional right of way. Or, at least, the west side of the turn table, which makes the obstruction, is too far west to be in the grant of congress. [Hamblin's evidence, page 14.] The conclusion is irresistable that the Railroad Company must have "fudged" in locating its right of way or the commission must have done so for them, or if neither the company nor the commission, somebody did.

We have two scales of measurement by which the proposition above asserted can be conclusively proven; the line of 300 feet on the west side of claim No. 225, and any of the other lines on the other maps, the length of which are given.

We agree with the counsel for plaintiff in error, that the commission had no right to designate or fix the location of their right of way, and if they had it would have been a difficult thing to do. The act gave the point of beginning as *about* six hundred feet from the southeast corner of section 33; thence running up *a ravine parallel* to and *south* of the *Benton wagon road*. "Parallel to a wagon road in Arkansas, would produce some singular contortions in a railroad particularly about the Hot Springs reservation, and where that wagon road was, or whether it was "not as straight as a rainbow nor quite as crooked as a corkscrew" has never been proven. It is not on the map. This court does not know whether client's property is or was north or south of that wagon road. The grant, however, proceeds "westwardly," as "the star of the empire" through said section to a point where the same will intersect with the Malvern stage road, at a point," and here the drafter seems to have almost given up in despair, and brought up "at a point

south of the graveyard." After commencing at *about* so many feet running up a *ravine*, *parallel* to a *wagon road* it is but natural to wind up at a *graveyard*, but in order to give himself a wide margin he said "*south of the graveyard.*" This court is not informed how far south that Malvern stage road ran, or whether south or north of the graveyard, and where that point may be laterally, may be a very *grave* subject, to the railroad; but one thing is certain that it could not come across the stage road, to build its line. However uncertain the general direction, the point of termination is certain. Why the company fixed upon Mrs. Williamson as the object of attack, is not known, neither is it known whether she was north or south of the graveyard. There is no graveyard on the map. Perhaps it never existed. Most western towns have graveyards, but as a matter of fact there is none on the Hot Springs Reservation. Plaintiffs in error may deny this, but if there is a graveyard in Mrs. Williamson's vicinity the record has been tampered with. No one had the right to locate the railroad's right of way. No one has done it in the evidence, and I defy the railroad to do it now for the purposes of this case. I call upon the appellant's counsel to show where and when he located a right of way, how he arrived at the conclusion that he is on his right of way, whether the description contained in the grant is sufficient to pass any right of way, and whether having located permanent structures in the street and used it for purposes inconsistent with a right of way he has not forfeited any easement he ever had.

The court and counsel confined the damages to the embankment in the instructions to the jury, and it has never been proven that any of the obstructions complained of were upon the right of way granted by congress.

The turn table which was not opposite the lot, would not have been a damage to them, if it had not been for the embankment, but the embankment being built, it alone damaged the lots on the north corner, and the turntable filling the space between the embankment and lot 9, viz., twenty-five feet, cut off approach in that direction which would not have been the case had there been no embankment.

But admitting, for the sake of argument, that it is necessary to construe the grant for the purpose of getting that turn table on the right of way; if the court can see from the evidence where the right of way was, what was granted? merely an easement. The entire ground, ex adverso these lots, and through which Benton avenue, formerly Gaines avenue, was extended, was the property of Fannie G. Williamson, prior to the twenty-fourth of April, A. D., 1876; and up to and including the final laying out of the streets, and the injury complained of; that is, occupied and improved by her and fronting 300 feet on the stage road. [See evidence of William H. Gaines, act of congress, etc.] The right of way did not, and could not, extend to it for the land was on the west side of the stage road. Now it must be supposed that congress when it granted the right of way, granted it subject to the then existing laws of Arkansas, which were in force as to all the highways in the state including the streets of Hot Springs. The laws of Arkansas required the railroad to restore all highways to the same degree of usefulness after building the track as before, and this creature of the laws of Arkansas, the Hot Springs Railroad, must obey the laws of the state, and if it did not, congress must have granted the right of way, subject to the right of those injured to have redress.

The evidence of witness Williamson, to the introduction of which, the plaintiff in error objected, and to the exclusion of which it now objects, was confined entirely to the allegations of the complaint not controverted by the answer, and wholly proven by all the other witnesses. This was no error. Carr vs. the State 43 Ark., Penn., R. R., vs. Roy 102 U. S. 451, and this is no Federal question.

The Arkansas Circuit Court did not err in refusing the instructions asked by the defendant.

The first one cannot be better replied to than in the language of Judge Cockrell:

"In every instance it is said [by defendants' attorney] the recovery can be had only where the owner has sustained special injury to his land—an injury not common to the public. It is not sufficient, however, to defeat the right, that a large number of persons suffer special damages. If so, it would only be necessary for the company, when an injury has been inflicted upon one to inflict it on many others in order to escape liability."

What a spectacle for gods and men, a railroad running a muck through a city, and when sued by an individuals, holding up its record of *awful destruction* as a mantle with which it to cover a multitude of sins, and giving as a reason why it should not be punished, that it had been so *awful bad*. "No individual" continues the judge, "can recover for the general public inconvenience. But all the cases agree that this special damage is done by the erection of an embankment in the street ex-adverso the owners premises." Mills on Eminent Domain Sec. 200, 206-7. Mrs Williamson does not sue for an injury which she *personally* suffers

in common with the public, on account of obstruction to travel, but one which she suffers from diminution in the value of *her property*, which the public is not concerned in. *She* only is concerned in that.

The modern and only sensible rule is as stated in the opinion of the Supreme court of Arkansas, viz: That property may be as effectually damaged without a physical invasion or spoliation as with it, (Parmelly vs. Greenbay, 13 Wallace 177) and this is peculiarly the case, and the law is settled in all those states, including Arkansas, who have adopted that provision in the constitution "that private property shall not be *damaged* for public use, without just compensation." Illinois, Colorado, Georgia, Nebraska, California, Missouri, West Virginia and Pennsylvania have adopted this provision. And in these states the question is settled that it is no longer necessary to be limited in this inquiry to actual taking.

Pusey vs City of Allegheny 98, Pa., St., 522.

City of Reading vs. Althouse 93 Pa., 400.

Reardon vs. San Francisco 7 A. and E. Cor., Cass 454.

Harman vs. Omaha, Ib, 474.

Worth vs. City of Springfield, 78 Mo., 107.

Gottschalk vs. R. R., 14, Neb., 550.

R. R., vs. Fellers, 16, Id, 169.

Rigney vs. Chicago 102, Ill., 64.

Atlanta vs. Greene 67, Ga., 386.

Denver vs. Boyer, Col., 23 Am., Law Register, 440.

Molandin vs. M. P. Ry., 14, Fed. rep., 394.

Johnson vs. Parkersburg 16, W. Va., 402.

Hutchinson vs. Parkersburg, 25, Ib 226.

Transportation Co., vs. Chicago 99, U. S. 635.

Mahady vs. Bushwick 91, N. Y. 148.

Sheehy vis. Kansas City Cable Railway Co., 94, Mo.. 574.

This last is a late and valuable exposition of the doctrine.

A very sensible case and to which are appended many notes of cases showing the law of to-day is:

Callahan vs. Gilman, 1 American State Reports, P. 831 [107 New York 360.]

Heiss vs. Milwaukee, L. W. Railroad Co., 69 Wisconsin 555.

Penn. Railroad Co., vs. Lippincott, 116, Pa. St. 472.

Pumpelley vs. Green Bay Co., 13 Wallace, 177.

he argument of Mr. Justice Miller in this case is fine. The city at the time the ordinance was passed had no authority to grant rights of way to railroads over its streets, because there had never been any law passed by the legislature giving that power, and without this it could not be done.

Angell on Highways, second edition, sections 33-4.

Dillon Municipal Corps, third edition, sections 701 (555) 703 (557) 705 (558.)

But even if the city had been possessed of such power it could not have given the right,and there can be no excuse for building a stone wall and embankment or other permanent structures in the street.

R. R. vs. Combs, 10 Bush, 382.

The damages are the same whether the fee is in the land owner or not.

14 Federal Reporter 394.

Mills on Eminent Domain, Sec. 200.

Redfield on R. R., p. 250.

5 Cent Law Journal, p. 385.

19 American Reps., 67.

23 Kansas, 585.

33 American Reps., 203.

The measure of damages in these cases in Arkansas is settled in 39 Ark., 167.

The act of the legislature March 1, 1883, confirming grants of rights of way, has no application, as the injury was done before that and the suit brought, and the constitution protected plaintiff.

The second instruction asks the court to say that the grant of the right of way by congress carried

with it the right to erect a depot and other permanent structures upon it. The act itself supposing that the attorney for the railroad might want to claim such an outrageous perversion of the government's bounty, in the same section which defines the grant points him to these words: "Provided that the said railroad company may purchase on the same terms as individuals, land for shops, depots and other purposes." That is by virtue of occupancy and improvement prior to April 24, 1876. Indeed the grant is an easement, and the building of permanent structures such as appropriate the fee, is a forfeiture of a right of way; and for that very purpose, congress in the second proviso uses the language, "Provided, however, that congress may at any time alter, amend or repeal this section." The railroad by building permanent structures, such as is mentioned in the act that they might buy land for, has forfeited its right of way altogether.

Taylor vs. Hampton, 4 McCord 96; seventeenth American Decisions 710.

The third instruction is substantially the same as the foregoing.

It is not apparent what the fourth means, and it was not insisted on that it should have been given in the court below.

The fifth and sixth instructions misstate the rule as to damages, and the court gave an instruction of its own, to the giving of which defendant did not except, which states the law correctly [Record P. 17] besides no point was made in the supreme court of Arkansas on them.

In conclusion the courts attention is called to a few re-

marks of learned judges as to the futility, [redacted] of the doctrine contended for by the attorney for the Hot Springs Railroad. Thus Mr. Justice Miller of the supreme court of the United States in

Pumpelly vs. Greenbay, 13 Wallace, 177, says:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection, and security to the rights of individuals as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law, on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the *absolute conversion* of real property to the use of the public, it can destroy its value entirely, can, inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at common law, instead of the government, and make it an authority for invasion of private rights, under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Mills on Eminent Domain, section 200; conceding the doctrine of the use of the streets, under grant of a city, where the legislature has given the power, which in the case of the city of Hot Springs, at the time of the passage of its ordinance, had never been given to the city: says:

"The use of a street by a railroad, *under authority of its charter*, is not a perversion of the highway from its original purpose, and the damage resulting from such obstruction is *damnum absque injuria*. The company, in the location, may lay such number of tracks as are essential to the convenient transaction of business, and for that purpose, may make any necessary alteration in the grade or surface of the highway. But when there is an entire conversion of the street by permanent structures of various kinds, to such uses as virtually block it up for all purposes of a street, *such use cannot be justified or included under a grant of a right of way*. The street cannot be occupied as a depot yard, for cars to stand in while they are loaded and unloaded; nor can *the track on* the street be raised on embankments, so that it cannot be used by ordinary vehicles; nor can the street be obstructed by timber, or rails, so as to interfere with its use. The company must for itself provide sufficient ground for depot purposes, and cannot use the public street for such purposes. That would be devoting the public street to purposes entirely inconsistent with the grant of a mere right of way, which must mean a way at ordinary grade. Such use could not be justified by the consent of the city authorities, although the city charta authorizes the city to abolish the streets."

In Arkansas the charta requires the city to keep them open and free from obstructions. Acts, 1774, p. 6, Sec. 7.

"Such an occupation will not be an abolition of a street, but a monopoly of it. Further than that, the abolition of a street would operate in a reversion of the land to the owner which would prevent the occupation by the railroad."

Again, "Besides the right of way which the public has

of passing over a street of a city, there is a private right which passes to the owner of the lot upon the street, and as appurtenant to it, which he holds by an implied covenant that the street in front of his lot shall forever be kept open to its full width. And it is *immaterial* whether or not the title of the owner extends to the middle of the street, as the right of action grows out of the ownership of the lot. While a proper use of a street by a railroad, *under legislative* and *municipal* authority may be had without payment of damages to adjoining owners, the use of the street cannot be materially interfered with. This is a valuable portion of the owner's property, and if he is prevented by high embankments from ingress and egress to his lots, there is special damage to such owner, an additional burden, for which compensation in damages must be made. The street must be still capable of use, as a street, and not interfered with so as to prevent its reasonable use as a street by adjoining proprietors. The *authority* to *occupy*, the street must be at the company's peril, and with the understanding that injuries of this nature to private individuals must receive compensation. The adjoining owner has an easement to go from his house out upon the pubiic highway; when there, his rights in the highway are no greater than the general public. The remedy for an obstruction to one's entering his own house is by action for the special wrong done; but for obstructing a street, when one's house was at some distance from the obstruction, the remedy is by indictment.

While it may be conceded that changes of grade may be made without compensation, yet this applies to the ordinary changes which may probably be made by a city, for use as a street, but would not apply to such changes as are

made in streets by deep cuts or embankments erected by railroads. These injuries require compensation to adjoining property owners. When egress or ingress is possible, no damages will be allowed, although the grade is raised four or five feet. [In this case four or five feet above grade,] but it was never understood that railroads could block up a street, so that ingress and egress to buildings would be rendered almost impossible or so that vehicles could not stand in the street while trains are passing. The adjoining owner has property in the street which is as much property *as the lot itself.* States which allow the running of railroads in the streets, without compensation, confine the giving of damages to those cases where the railroad hinders materially the ordinary use of the street; and where the property is thereby measurably depreciated in value."

41 Arkansas, 441.

But all the authorities agree that in a case like the one at bar, damages are allowed. As in a case in Kentucky, when ingress and egress were cut off to a valuable mill, by changes in a grade of the street, the court held the damages too large for the individual owner to bear, and that the city should pay; and if it could not pay, they should not be allowed to impose the burden on the citizen.

Louisville vs. Rolling Mill Co., 3 Bush, 416.

Before concluding, the court will pardon a reference to that ordinance of the city of Hot Springs. In the case of the state for the use of Garland County, [Mss.] the supreme court of Arkansas, in construing a part of this same act of congress granting a site to the county of Garland for the public buildings holds the municipal authorities to be trustees of

the land, which had been fraudulently leased, and that any perversion was a breach of trust. What is said in that connection might justly be said of the city council of Hot Springs, when they passed the following ordinance. [Record p. 9.]

"An ordinance authorizing the Hot Springs R. R. Co., to erect and maintain depot buildings and enclose "right of way" on Benton street from Pleasant street to Malvern avenue.

16 *Ordinance as to Buildings, &c.*

Be it ordained by the city council of Hot Springs:

SEC. I. That the Hot Springs Railroad Company shall be, and is hereby authorized and empowered to erect all necessary and suitable depot buildings and other structures incident to the operation of its road within the limits of its "right of way," granted it by congress, within the Hot Springs reservation, and to maintain and continue the same or any depot buildings or other erections or improvements heretofore constructed or made by it.

SEC. II. That part of Benton street between Pleasant street and Malvern avenue, within the limits of the "right of way" granted by congress to the Hot Springs Railroad Company within the Hot Springs reservation and the extension thereto, heretofore granted by the city of Hot Springs, except so much thereof as shall be required to leave open the crossing of Cottage street, is hereby vacated and closed, and the extensive use and control thereof is granted to the Hot Springs Railroad Company for railroad and depot purposes.

SEC. III. This ordinance shall take effect and be in force from and after its passage.

Approved February 26, 1883.

A. R. SMITH, *Mayor.*

Attest: D. H. HARRIS,
City Clerk.

I, D. H. Harris, city clerk of the city of Hot
17 Springs, Ark., hereby certify that the above and foregoing are true and correct copies of the ordinances adopted by the city council of this city in regard to "right of way" of Hot Springs Railroad.

Given under my hand and the seal of this office this 28th day of February, A. D., 1883.

D. H. HARRIS,
City Clerk.

Endorsed: Original ordinance vacating Benton street. Ordinance to be copied.

And it was admitted that the defendant filed its written acceptance of the ordinance approved the 8th day of December, 1880, within ten days after its adoption."

As held in state for use of Garland County vs. Baxter, *this document is a fraud upon its face.* The whole of Benton avenue between Pleasant street and Malvern avenue (the street east of plaintiff's lots) "is *vacated* and *closed* and the "extensive" (exclusive) use and control thereof is hereby granted to the Hot Springs Railroad Company for railroad and and depot purposes,"

And this by a city without the power to grant even a right of way to a railroad! Whose charta required it

[Acts 1874, p. 6, Sec. 7] to "cause the streets to be kept open and in repair, and free from nuisances."

"Gaines avenue" covering the very ground thus given to the railroad, "was located as a street of said city of Hot Springs, and opened and accepted by the city in October or September, 1876." [Agreed statement of facts, Record, p. 6.]

This ordinance was passed at the request of the railroad, accepted by it, [Record, p. 7] and a written agreement entered into by the "party of the first and second part ratifying it," and placed on record among the deeds and mortgages. [Record, p. 7, 8, 9 and 10.]

Verily, the charge in the complaint that the acts complained of were committed "*under a fraudulent and unauthorized contract or arrangement*,"—the only allegation not admitted by the answer, was fully sustained by the proof introduced by the railroad itself.

Respectfully submitted,

~~R. G. DAVIES~~.

A. H. Garland
for Defts.